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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. 582

WILLIAM RANCE AND RUTH V. RANCE,
Petitioners,

VERSUS

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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September, 1965

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

WILLIAM RANCE AND RUTH V. RANCE,
Petitioners,

VERSUS

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

William Rance and Ruth V. Rance, for themselves and for the class denoted as customers of licensee-retailers of The Sperry and Hutchinson Company, petition for a writ of certiorari to review the decision of the Supreme Court of the State of Oklahoma affirming the granting of an injunction against the Rances prohibiting them from buying, selling, or exchanging trading stamps issued and distributed by The Sperry and Hutchinson Company.

OPINIONS BELOW

The Superior Court of Oklahoma County, State of Oklahoma, filed the following opinions and judgment which are not reported:

(1) Findings of Fact and Conclusions of Law

(2) Order Sustaining in Part and Overruling in Part Motion to Modify and Supplement Findings of Fact

(3) Journal Entry of Judgment.

These are printed in Appendices A to C, *infra*, pp. i-xi.

The opinion of the Oklahoma Supreme Court, affirming the granting of the injunction, is not yet reported; it and other related orders are printed in Appendices C to F, *infra*, pp. xii-xxxix.

JURISDICTION

The judgment of the Superior Court of Oklahoma County granting a permanent injunction against William Rance and Ruth V. Rance was affirmed by opinion of the Oklahoma Supreme Court on April 13, 1965. The petition for rehearing was denied by the Oklahoma Supreme Court on June 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the distribution of trading stamps to a customer in a retail sale as required by agreement between S & H and its retailer-licensees is an illegal tying arrangement in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act where the stamps are neither transferable nor redeemable in cash but may only be exchanged for S & H merchandise.

2. Whether the licensee agreement between S & H and its licensee-retailers creates a vertical price-fixing combination in violation of Section 1 of the Sherman Act by compelling the retailer to offer trading stamps at a fixed

rate equivalent to 2.8 per cent of his retail sales where the retailer's customers may neither transfer the stamps nor redeem them in cash but may redeem them only for S & H merchandise at redemption rates fixed by S & H.

STATUTES INVOLVED

Section 1 of the Sherman Anti-Trust Act of July 2, 1890, as amended, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any

contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 3 of the Clayton Act of October 15, 1914, 15 U.S.C. § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

STATEMENT

Nature of the Proceeding

On June 11, 1962, The Sperry and Hutchinson Company (S & H) filed suit in the Superior Court of Oklahoma County, State of Oklahoma, against the petitioners William Rance and Ruth V. Rance (the Rances) (R. 559-571). The Rances operate a small trading stamp exchange (R. 621). They buy, sell, and exchange trading stamps including S & H stamps (R. 624). S & H sought an injunction to prevent the Rances from trading S & H stamps (R. 562-565).

The Court of First Instance

S & H alleged that it:

> ". . . grants to its merchant-licensees the exclusive right to use the S & H service in their types of business in their competitive or trade areas, and thereby creates a 'family' of non-competing merchants . . ." (R. 561).

The petition alleged that by reason of the license contracts (Pl. Ex. 1A; R. 399-401):

> ". . . title to the stamps remains in S & H . . . that the stamps are not transferable without the written consent of S & H . . . and that the only right which the customer acquires in the stamps is to paste them in the collector's book and to present them to S & H for redemption" (R. 560).

The petition further alleged that the Rances buy, sell and exchange trading stamps including those of S & H (R.

561), and that these activities of the Rances were causing S & H irreparable harm. The petition prayed for permanent injunctive relief (R. 562, 565).

The defendants' Amended Answer presented the federal questions as a defense to the action by the following allegation:

> "Plaintiff is now, has been and threatens to continue to be in violation of the public policies and statutes of the United States of America in and in connection with its interstate business and in and in connection with its intrastate business, inextricably commingled, in that by virtue of the facts, contracts and circumstances alleged in plaintiff's Petition it appears and must be found that plaintiff was, now is and will continue to be a member of and engaged in a combination and conspiracy in restraint of trade, in violation of the Sherman and Clayton Acts of the United States of America and other related statutes, as well as contrary to numerous decisions of the Supreme Court of the United States" (R. 581).

The Amended Answer further prayed that S & H be permanently enjoined from:

> "(1) Continuing its monopolistic practices, contracts, advertising and mode of operations as above described;
>
> "(2) Suing, harassing or interfering with these defendants in the operation and conduct of the business of said William Rance; and
>
> "(3) Hindering, admonishing or threatening any Oklahoma member of the class of 'customers of the licensees' of plaintiff in connection with the ownership, control and disposition of his trading stamps issued by plaintiff" (R. 585).

The trial court's Findings of Fact,[1] Numbers 1 through 10, describe the parties' methods of doing business:

"1. The plaintiff is a New Jersey corporation engaged in the trading stamp business. It has been engaged in this business throughout the United States since 1896. It is qualified to do and has done business in the State of Oklahoma since 1911 (R. 620).

"2. The parties have stipulated, with the Court's approval, to waive their claims and cross-claims for damages, each against the other, up to the date of the judgment herein, but each reserves the right to prove such damages as pertinent to the equities involved in the cause (R. 620).

"3. Plaintiff does an interstate business involving its business activities in 47 states of the United States. It is excluded from Kansas entirely by law. In Washington, Wisconsin and Wyoming it is required by law to redeem its 'cash discount' stamps for cash. In 13 other states it is required to afford the customers of its licensees options to take merchandise or cash (R. 620, 621).

"4. The defendants are individuals engaged in conducting the business of a trading stamp exchange at 100 Northwest 22nd Street, Oklahoma City, Oklahoma, called the Trading Stamp Exchange (R. 621).

"5. In the conduct of its business, the plaintiff enters into license contracts with retail merchants offering a variety of goods and services, and grants to each licensee in a particular line of business the exclusive right to its S&H Cooperative Cash Discount System within his competitive area. S&H has over 70,000 licensees throughout the United States. It has

[1] The Findings of Fact and Conclusions of Law are set forth in their entirety in Appendices A and B.

approximately 1,000 licensees in the State of Oklahoma, about 300 of which are in Oklahoma City (R. 621).

"6. Plaintiff's method of doing business throughout at least 29 states of the United States and particularly in Oklahoma, and as to the Oklahoma portion of its interstate business and as to its intrastate business in Oklahoma is substantially as follows (R. 621):

(1) Plaintiff contracts in writing with its licensees, who are usually vendors of merchandise or services, some 70,000 in the United States and 1,000 in Oklahoma, 300 of which are in Oklahoma City, Oklahoma, whereby it agrees, inter alia, to supply S&H Green Trading Stamps to said licensees at stipulated prices. These contracts, at least in most instances in 29 states, including Oklahoma provide that (R. 621):

(a) Title to the stamps is reserved in Sperry and Hutchinson Company (R. 621);

(b) The stamps can only be redeemed if pasted in a booklet of 1200 stamps and surrendered to Sperry and Hutchinson Company at one of its Redemption Centers (R. 622);

(c) The stamps can only be redeemed in merchandise offered and provided by Sperry and Hutchinson Company for such purpose in units determined by Sperry and Hutchinson Company at prices (per unit) fixed by Sperry and Hutchinson Company (R. 622); and

(d) During the calendar year 1961 S&H stamp collectors redeemed merchandise from plaintiff's redemption centers located in Oklahoma of the approximate retail value of $4,000,000.00, which

merchandise had a cost value to plaintiff of approximately $2,000,000.00 (R. 638, 639).

These contracts contain no commitment or covenant of the licensees that they will furnish or deliver the booklets for pasting purposes to the customer and such is not usually done until the customer requests the booklet, at some later time, if at all, after he has received stamps (R. 622).

(2) Plaintiff provides 'Redemption Centers,' some 14 in Oklahoma, stocked with merchandise selected by Sperry and Hutchinson Company which it offers for redemption of stamps at retail prices fixed by Sperry and Hutchinson Company and acquired by it under contracts with its suppliers which it chooses and at prices which it negotiates and determines (R. 622).

(3) Periodically, Sperry and Hutchinson Company composes, has printed, issues and distributes its 'catalog,' delivered to large numbers of the holders of the stamps through plaintiff's licensees, in and by which Sperry and Hutchinson Company advises what merchandise it has for redemption of stamps and what the unit price for same is as determined by Sperry and Hutchinson Company (R. 622).

(4) If, as and when booklets containing the required number of stamps are surrendered in plaintiff's specified units at plaintiff's rates, the merchandise selected by the holder of the stamps, within the limited offering by Sperry and Hutchinson Company, is delivered to the holder of the stamps (R. 623).

"7. The plaintiff expends annually many millions of dollars in extensive national and local advertising and publicizing the desirability and the benefits of the

S&H service to S&H stamp collectors. This advertising has created extensive good will and public acceptance for the service. There are more than 33,000,000 S&H stamp collectors in the United States. About 300,000 to 400,000 of these collectors live in Oklahoma (R. 623).

"8. The front cover of the S&H stamp collectors' book contains a notice that neither S&H stamps nor collectors' books are sold to S&H licensees, S&H stamp collectors or any other persons and at all times the title thereto is expressly reserved to S&H; that the only right S&H stamp collectors acquire in S&H stamps is to paste them into S&H stamp collectors' books and present them to S&H for redemption; that S&H stamp collectors must not dispose of S&H stamps or collectors' books or make any further use of them without S&H's consent in writing; that if S&H stamps or collectors' books are transferred without such consent, S&H reserves the right to restrain their use by or take them from the persons to whom they are transferred and that the use of S&H stamps and collectors' books is restricted to S&H licensees and their customers (R. 623).

"9. In one state, Kansas, plaintiff is prohibited by law from carrying on its business. In three others, Washington, Wisconsin and Wyoming, plaintiff is required by statute to redeem the stamps in cash. In Thirteen (13) other states the statutes require that the stamps be redeemed by plaintiff either in cash or merchandise—at the option of the holder (R. 623, 624).

"10. The defendants buy and sell S&H stamps, exchange S&H stamps for other brands of trading stamps and other brands of trading stamps for S&H trading stamps, for a fee, and advertise by newspaper, radio and other media that they conduct a trading stamp exchange" (R. 624).

The trial court also found that "trafficking" in trading stamps by the Rances caused irreparable harm to S & H (R. 624, 625; See Findings of Fact 11-16, Appendix A, p. v).

Under the license contract, a retailer-licensee pays $2.80 per 1,000 stamps (R. 472)[2] and is required to offer one stamp for each 10 cents of retail sales (Plaintiff's Ex. 1A, R. 399-401).

S & H is the oldest and largest trading stamp company (R. 432, 433). The business of S & H in Oklahoma represents less than 1 per cent of its nationwide business (R. 478, 479).

When the stamps are distributed to a customer of a licensee-retailer, the customer is not told that he is not to have title to the stamps, and no instances of a customer being so advised at the time the stamps are delivered to him are known (R. 353, 354). A witness for S & H did not know of a single instance in advertising where the statement was made that The Sperry and Hutchinson Company reserves title to the stamps (R. 456).

A collector of S & H Green Stamps testified that she did not know until the time the lawsuit was filed that S & H claimed to reserve the ownership of the stamps (R. 537, 538). It was stipulated (R. 542, 543) that the Rances had in court some eight or ten other witnesses and would produce if necessary some 50 to 100 other witnesses who would all testify to the same facts.

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[2] The price varies in three other geographical areas of the United States (R. 471).

Following the presentation of evidence to the Superior Court for Oklahoma County, State of Oklahoma, the federal questions were urged to the court by the defendants' requests for findings of fact and conclusions of law (R. 601-613). The following numbered requests, which were refused by the court (R. 620-626; Appendix A) presented the federal issues:

"REQUESTED FINDINGS OF FACT:

"No. 9. Plaintiff's mode and method of doing business, including its licensee contracts with its licensees constitute an arrangement amounting to a 'combination' vertical in design, character and scope whereby plaintiff creates, secures and/or reserves unto itself sole control of a large segment of trade in the United States and particularly in Oklahoma. Under this combination and as part of it plaintiff has secured and controls (1) the stamps issued by plaintiff's licensees, and (2) the redemption merchandise selected by plaintiff for delivery to the customers of its licensees at prices determined solely by plaintiff. These are 'tied' together by plaintiff's plan and in plaintiff's operations. The plan thus contains a 'tying' agreement whereby the contract between the customer and his vendor is 'tied' to the agreement between the plaintiff and its licensee. Such customer cannot take the 'cash discount' from his vendor without being 'tied' to buying plaintiff's merchandise in its designated quantities at its prices (R. 606).

* * * * * *

"No. 12. Plaintiff's method of operating including the reservation of the title to the stamps, *coupled* with the requirement that they be redeemed by the Sperry and Hutchinson Company for merchandise selected by it at prices determined by it, constitutes an illegal and forbidden combination in restraint of trade and an

arrangement monopolistic in character in violation of the anti-trust laws of the United States, and the contract which is part thereof sought to be applied to bind customers of plaintiff's licensees is void as against the public policy of the United States and separately of the State of Oklahoma (R. 607, 608).

"REQUESTED CONCLUSIONS OF LAW

"No. 5. Since the contract provision, upon which plaintiff relies to support its claim that customers of plaintiff's licensees do not own the stamps delivered to them by plaintiff's licensees, has been used and is being used by plaintiff to establish, create and maintain a vertical combination in restraint of trade and to diminish and lessen competition, same does not bind those with whom defendants deal and may deal in exchange, barter, disposal and acquisition of stamps and there can be no interdiction against defendants which prohibits their acquiring property or rights which said customers have a perfect legal right to pass them. Defendants are thus within their legal rights in acquiring, exchanging and bartering for said stamps and so disposing of them and offering publicly so to do. The Constitution and laws of the United States and those of the State of Oklahoma protect defendants in the exercise of such rights" (R. 611, 612).

In response to the court's refusal to adopt the requested findings of fact and conclusions of law above set forth (R. 620-626, Appendix A) the Rances filed exceptions to the trial court's Findings of Fact and Conclusions of Law and moved to modify and supplement the findings of fact (R. 614, 615). The court then entered an order sustaining in part and overruling in part the combined motion, which order was adverse to the Rances on the federal issues (R. 638, 639, Appendix B).

The federal issues were again raised at the trial stage by motions of the Rances for new trial (R. 617-619) which set forth as the fifth ground in support of the motion, the following:

> "5. Each of said Conclusions of Law is contrary to established law and to the Constitution and the Statutes of the State of Oklahoma and to the Statutes of the United States of America and controlling decisions of the Courts predicated thereon . . ." (R. 618).

The motion for new trial was overruled.

On October 26, 1962, a judgment was entered against the defendants permanently enjoining them from buying, selling, trading, exchanging, or dealing in any other way with S & H Green Stamps (R. 627, Appendix C).

The Appellate Court

On appeal to the Supreme Court of the State of Oklahoma, the federal issues were presented by the Petition in Error. Of the assignments of error presenting the federal questions, the following are set forth:

> "17. The trial court committed error in not finding the facts as requested in Defendants' Requested Finding of Fact No. 9 . . . in that the uncontradicted evidence and the law, State and Federal, required same" (R. 9, 10). (See Requested Finding of Fact No. 9, *supra*, p. 12.)
>
> * * * * * *
>
> "19. The Trial Court committed error in not finding the facts as requested in Defendants' Requested Finding of Fact No. 12 . . . in that the uncontradicted

evidence and the law, State and Federal, required same" (R. 11, 12). (See Requested Finding of Fact No. 12, *supra*, pp. 12-13.)

* * * * * *

"26. The Trial Court committed error in not making, adopting and entering Conclusion of Law No. 5 as requested by Defendants, . . . in that the uncontradicted evidence and the law, State and Federal, required same" (R. 17, 18). (See Requested Conclusion of Law No. 5, *supra*, p. 13.)

On the merits, the brief of the Rances again urged the federal issues (R. 23-100). There were two basic arguments. First, it was argued by the Rances that:

". . . The indisputable effect of the vertical combination or arrangement which is the heart and soul of the Stamp Company's business as it is done in Oklahoma and in interstate commerce to supply its Oklahoma licensees, results in and effectively uses a '*tying* agreement' to bind the customers of the Stamp Company's merchant-licensees to buy also the redemption merchandise from the Stamp Company" (R. 79).

Second, the Rances argued that the S & H licensee agreements created an illegal vertical price-fixing combination:

"The purpose, intent and effect of each such 'contract' is to place the Stamp Company in complete control and management of the operation from first to last and thus (a) of the stamps (themselves articles of commerce), and (b) of the redemption merchandise, its market and price (4 million dollars retail sales price against a cost of 2 million dollars in 1962 alone); and (c) this results from a 'vertical combination' or a

system embracing numerous 'vertical combination' (all with one aim, as stated) (R. 61).

* * * * * *

". . . The accomplishment of the plaintiff's purpose and plan, as revealed by the evidence (not only to exclude from the channels of commerce the trading stamps which have been issued and delivered as 'cash discounts' [See *Safeway* case hereinafter cited] and thus to control the incidents of ownership of such stamps but as well the delivery and price of 'premium' merchandise used in the redemption of such stamps) crystalizes into one of the salient reasons for the plaintiff's unquestioned dominance and control of an industry which has become wide spread in its activity, and so vital to the housewives of the country as to clothe it with a public interest" (R. 76, 77).

The Oklahoma Supreme Court expressly ruled on the federal questions (R. 246-268; Appendix D). In response to the argument that the customers of a licensee are bound by an illegal tying arrangment, the Court held:

> "In the instant action, licensees do not purchase a commodity but a service, and is not required to purchase a 'tying' product" (R. 265).

In ruling on the contention that S & H created an illegal vertical combination the Court concluded:

> "In our opinion, and we so hold, that the method by which plaintiff conducts its business in Oklahoma is not in violation of our State and Federal Laws" (R. 266).

The decision of the trial court was affirmed by opinion of the Oklahoma Supreme Court on April 13, 1965,

which is set forth in full in Appendix D, at pages xii through xxxviii.

The Petition for Rehearing dealt solely with the federal issues. Specifically, a rehearing in the case was sought upon the following grounds:

1. The opinion rendered by this Court on April 13, 1965, would enforce and result in an illegal tying arrangement in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act and in contravention of the decided cases of the United States Supreme Court.

2. The decision would sustain and enforce an illegal price-fixing vertical combination, which is in violation of Section 1 of the Sherman Act.

3. Both the tying arrangement and the price-fixing vertical combination have a substantial impact on commerce and tend to restrain trade and lessen competition (R. 273, 274).

The Petition for Rehearing was denied on June 22, 1965 (R. 295).

On July 27, 1965, the Oklahoma Supreme Court stayed issuance of the mandate pending perfection of appeal to this Court (R. 308; Appendix F).

SUMMARY

The Sperry and Hutchinson Company (S & H) conducts an interstate business in 47 states of the United States (R. 620, 621). The petitioners, William Rance and Ruth V. Rance, operate a trading stamp exchange at 100

N.W. 22nd Street in Oklahoma City (R. 621); S & H seeks to enjoin them from trading S & H stamps (R. 562, 565).

In three states, S & H is required by law to redeem the trading stamps for cash only (R. 620, 621) and in 13 other states it is required by law to provide an option of redeeming for either cash or merchandise (R. 620, 621).

In at least 29 states, including Oklahoma, S & H trading stamps are not redeemable for cash (R. 621). In these states, S & H seeks to prevent free transferability by reserving title to the stamps (R. 621). The stamps may be redeemed only for S & H merchandise at redemption rates determined from time to time by S & H (R. 622).

Under the S & H license contract, a retailer pays $2.80 per 1,000 stamps (R. 472) and is required to offer one stamp for each 10 cents of retail sales (Pl. Ex. 1A, R. 399-401). The licensee-retailer is thereby compelled to distribute the stamps at a fixed rate equivalent to 2.8 per cent of his total sales.

This method of operation creates an illegal tying arrangement in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 3 of the Clayton Act (15 U.S.C. § 14). The customer of a licensee-retailer pays a combined price for retail goods and the trading stamps. The stamps are not redeemable in cash (R. 622). By means of the reservation of title, S & H attempts to prevent free transfer of the stamps (R. 560). Consequently, a consumer only obtains one right with the stamps, that is, the right to redeem for S & H merchandise (R. 623). By this arrangement, S & H has tied the sales of its merchandise to the

sales of some 70,000 of its retailer-licensees in the United States, including 1,000 in Oklahoma (R. 621).

The prohibition against free transferability is an essential element of this scheme. The restriction on transfer has two effects:

1. Since a consumer may neither sell nor trade the stamps, he is tied to S & H merchandise, and
2. The consumer must make further purchases involving tied sales in order to realize any redemptive value from the trading stamps.

The license contract provision (Pl. Ex. 1A, R. 399-401) reserving title to the stamps is the heart of this tying arrangement. The provision should therefore be held invalid and unenforceable against consumers and the Rances.

The S & H license contract and method of doing business also constitutes a vertical price-fixing combination in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The price fixing occurs in two ways:

1. S & H not only determines the price charged to its licensee-retailers for the stamps, but by the license contract requires them to be offered or distributed at a rate equivalent to 2.8 per cent of the retail sales.
2. S & H reserves the right to fix the redemption rate at any time prior to redemption. Since S & H prohibits a consumer from selling, trading, or otherwise disposing of the stamps, S & H is thereby enabled to fix the value of the stamps after the tying sale has occurred.

By reason of the prohibition against transfer of the stamps, S & H thereby assures the effectiveness of retroactive price fixing.

This case calls into question the practices of the largest trading stamp company (R. 432, 433) with its concomitant impact on the Rances and on a large segment of the consuming public. In 1961, the year prior to the trial of this cause, there were more than 33 million consumers who were collectors (by choice or otherwise) of S & H trading stamps (R. 623).

Indeed, this Court has recognized the economic impact of the trading stamp industry. In *Safeway Stores* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334 at 338, the Court said:

> "Trading stamps have had a checkered career in the United States, but since World War II their popularity has grown until now it is a reasonable estimate that these multi-colored scraps of paper may be found in almost half of America's homes."

But this Court has not passed on the precise questions here presented.[3]

Despite the substantial impact of these practices on the public, the only notice to the stamp collectors that they may not dispose of the S & H stamps and that the stamps are redeemable only in S & H merchandise is found on the

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[3] Violation of the federal anti-trust laws was apparently suggested to the Court in *Safeway Stores* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334 at 342, footnote 7, but the claim was not made below.

inside front cover of the stamp collector's book (R. 353, 354, 456, 623).

Examined in the light of applicable principles, the decision of the Oklahoma Supreme Court erroneously applied federal law. The injunction against the Rances sustains an illegal contractual provision prohibiting transfer of the stamps; a provision which is essential to the "tying arrangement" and "price-fixing combination." The decision of the Oklahoma Supreme Court should therefore be reversed and S & H should permanently be enjoined from further engaging in this method of operation and from reserving title to the stamps which it issues.

REASONS FOR GRANTING THE WRIT

I

The S & H method of doing business constitutes an illegal tying arrangement in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

A. ***A sale by a licensee-retailer of merchandise and S & H stamps for a single price to a purchaser is a "tie-in" sale where the purchaser is prohibited from disposing of the stamps.***

The classical example of an illegal tying arrangement is the conditioning of the sale of one product to the purchase of another. In *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, at 25, this Court said:

> "Tying agreements by which the sale of one commodity is conditioned on the purchase of another have been repeatedly condemned under the anti-trust laws,

since they serve no purpose beyond the suppression of competition."

Thus, a tie-in sale need not expressly exclude a dealer from purchasing the products of another; it is enough that there is a "block" price for two items. *United States* v. *Loew's Inc.*, 371 U.S. 38.

In the instant case, a purchaser of goods from a licensee-retailer pays a "block" price for the merchandise and the S & H Green Stamps. The licensing agreement provides that the licensee agrees:

> "To offer S & H cooperative cash discount stamps to all customers making cash payments and when accepted to issue to the customers one of said stamps for each 10¢ represented in such payments as a discount in consideration of the payment of cash when made either C.O.D. or, at the option of the Licensee, on or before the 20th proximo, and only for redemption by the Licensor" (Pl. Ex. 1A; R. 399-401).

This provision requires the licensee to distribute one stamp for each 10 cents of retail sales. Since the licensee initially pays $2.80 per 1,000 for the stamps it distributes (R. 472), the cost of the stamps represents 2.8 per cent of the price for goods which the purchaser pays to a retailer-licensee. To say that a purchaser might refuse to accept the stamps does not derogate from the fact that he has paid a combined price for the retailer's merchandise and the stamps.

The purchaser obtains only one right with such stamps, and that is to obtain merchandise from S & H as a result of the initial payment to a licensee-retailer (R. 623). This

situation falls within the ambit of *United States* v. *Loews Inc.*, 371 U.S. 38, in which the Court condemned contracts compelling block sales of two films, that is, the sale or lease of one film conditioned on the payment of a "block" price for two films. It is no objection to the illegality of the contract that the purchaser in such case might pay the block price and yet refuse to accept or use the second film. Likewise, in the present case, any ability of the purchaser to refuse to accept the Green Stamps is no objection to the fact that a block sale of two items takes place for a single price.

The unusual aspect of the practice questioned here is that the tying sale takes place on an incremental basis. Logically, the fact that the cost percentage of the stamps in a retail sale (on the order of 2 to 3 per cent) is small and the S & H merchandise will not be obtained until later, if at all, should not relieve S & H of the proscription against tying arrangements.

It is the action of S & H in irrevocably tying the purchaser to the redemption of S & H merchandise which establishes the existence of an illegal tying arrangement in this case. It might be said that if the purchaser were free to give away, barter, or sell his Green Stamps, that this situation might fall short of an illegal tying arrangement. However, it is the very act of tying the purchaser to the redemption of S & H merchandise by a prohibition against transfer that brings this case squarely within the type of activity condemned by the Sherman and Clayton Acts and applicable decisions of this Court.

Only the activities of the petitioners in buying, selling, and exchanging trading stamps prevent the customer-purchaser from being irrevocably tied to S & H merchandise.

It was held by the Oklahoma Supreme Court that the stamps do not represent articles in commerce, but rather a service and that there was consequently no violation of federal law (R. 265). Under the Sherman Act, this holding is obviously error since the provisions of the Act apply whether the stamps are classed as "articles in commerce" or "services." *Associated Press* v. *Taft-Ingalls Corporation,* 340 F.2d 753 at 758. Under the Clayton Act, the Oklahoma Supreme Court rationale is apparent sophistry since the merchandise offered by S & H clearly represents "articles in commerce." The right to obtain merchandise is the only right that the collector of S & H stamps is permitted to acquire by the S & H licensing agreement (R. 623).

The stamp thus represents a contract right, at the very least, and that right is to obtain merchandise from S & H as a result of a prior payment of a "block" price to a licensee-retailer for goods *and* the stamps. Whether the stamps issued to a purchaser by a licensee-retailer are "articles in commerce" is immaterial because the merchandise ultimately obtained from S & H is clearly a "commodity" or an "article in commerce." Therefore the tying arrangement is subject to Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 3 of the Clayton Act (15 U.S.C. § 14). *United States* v. *Loew's, Inc.,* 371 U.S. 38; *Black* v. *Magnolia,* 355 U.S. 24.

In the normal situation, tying arrangements usually involve only a single seller. However, tying arrangements are condemned because of their anti-competitive effect, and the fact that S & H achieves its unique tying arrangement by contract with thousands of retailers (R. 621) will not remove it from the sphere of condemned practices under the anti-trust law.

Under the applicable authorities, a sale by a licensee-retailer of merchandise *and* S & H stamps for a single price to a purchaser constitutes a tie-in sale where the purchaser is prohibited from disposing of the stamps and may not redeem them for cash. This arrangement contravenes Section 1 of the Sherman Act and Section 3 of the Clayton Act.

B. *The tying arrangement involves a unique and substantial market.*

The record establishes that S & H is the "bell wether" of the trading stamp industry since it is the largest in the United States (R. 432, 433). The tying arrangement is effected by means of licensing agreements with 1,000 retailers in Oklahoma and approximately 70,000 nationwide (R. 621). S & H obtains its merchandise from manufacturers[4] and does business in 47 states (R. 620, 621). S & H was found to be engaged in interstate commerce (R. 620, 621). Without more, it is clear that a "not insub-

[4] Slightly over 1,500 items are made available for redemption (R. 485). These items are purchased directly from manufacturers (R. 487-489). It would seem a fair inference that they are located throughout the United States.

stantial" amount of interstate commerce is affected. *Northern Pacific Railway Company* v. *United States,* 356 U.S. 1, at 6.

In addition to the magnitude of the operation of the tying arrangements, the sale of merchandise offered by S & H is tied to the sales of thousands of products offered by the retailer-licensees, which products are both patented and unpatented.[5] It is a fundamental proposition that where any sales involve a tying arrangement with a patented product such a sale is illegal *per se* without proof of "sufficient economic power" or proof of the size of the anti-competitive impact on the market. In *United States* v. *Loew's, Inc.,* 371 U.S. 38, at 50, MR. JUSTICE GOLDBERG, speaking for the Court, said:

> "Appellants urge that . . . the fact that a few contracts were found to be illegal does not justify the entering of injunctive relief. We disagree. Illegality having been properly found, appellants cannot now complain that its incidence was too scattered to warrant injunctive relief."

Thus the illegality of these tying arrangements instituted by S & H is clear even without consideration of the magnitude of S & H's economic power. *Jerrold Electronics Corp.* v. *United States,* 365 U.S. 567; *Standard Oil Co.* v. *United States,* 337 U.S. 293; *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131; *International Salt Co.* v. *United States,* 332 U.S. 392; *Mercoid Corp.* v. *Minneapolis-Honeywell Recorder Co.,* 320 U.S. 680.

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[5] This Court is requested to take judicial notice of the commonly known fact that retailers sell patented as well as unpatented products.

II

The tying arrangement is a restraint of trade and substantially lessens competition.

Tying agreements are condemned under the antitrust laws "since they serve no purpose beyond the suppression of competition." *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, at 25. The requirement of S & H licensing agreements which compels the licensee to offer one S & H stamp for every 10 cents in merchandise purchased from such retailer (Pl. Ex. 1A, R. 399-401) demonstrates the size of the market obtained by these arrangements. These agreements involve non-competitive retailers of which 1,000 are in Oklahoma alone and approximately 70,000 nationwide (R. 621). The retail value of the merchandise redeemed from S & H in Oklahoma in the year 1961 alone was in excess of $4,000,000.00 (R. 638, 639). This figure represents less than 1 per cent of the nationwide business of S & H (R. 478, 479).

By prohibiting a purchaser from selling, trading or disposing of the stamps, S & H effectively prevents a direct market comparison between the value of the S & H merchandise represented by its stamps and the values offered by any other stamp company. The tying arrangement operates to restrain trade and competition in the following significant ways:

1. The arrangement prevents competition between stamp companies in terms of redemption value. The record reveals that there are only four other stamp companies in Oklahoma (R. 625) and the attempted restraint on disposition of stamps by a purchaser, except by means of redemption with S & H, limits

the most effective form of market competition of the merchandise values of S & H.

2. The tying arrangement results in a captive market which by definition is substantially removed from the area of competition. The captive market results from the tying sale in two ways:
   a. Each tied sale is captive in itself, and
   b. The tying arrangement necessitates further purchases involving "tied" sales in order for the purchaser to realize any redemptive value for the stamps.
3. A tying arrangement tends to exclude other merchandisers from markets which they might otherwise have.
4. The tying arrangement allows S & H to obtain an illegal advantage by tying the sale of its stamps and thereby its merchandise to the sale by licensee-retailers of thousands of well-known products sold under trade names, trade marks, copyrights, and patents, as well as deriving advantage from the trade names and trade marks of licensee-retailers themselves. These anti-competitive marketing results of tying arrangements have been restated by this Court on numerous occasions and universally condemned. *United States* v. *Loew's, Inc.*, 371 U.S. 38; *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24.

The tying arrangements therefore result in a significant captive market for S & H which is substantially removed from competition.

III

The licensing agreement creates a price-fixing vertical combination in restraint of trade.

By the terms of the licensing contract S & H not only establishes the price for the sale of the stamps to its licensees, but also fixes the distribution of the stamps at one for each 10 cents of retail sales (Pl. Ex. 1A, R. 399-401). S & H thus fixes the cost of the ultimate disposition of stamps to the purchaser at approximately 2.8 per cent of the total amount of the retail purchase.

This Court said in *Dr. Miles Medical Co.* v. *John V. Park & Sons Co.*, 220 U.S. 373, at 409:

> "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

The licensing agreement, by fixing the rate of distribution of the stamps, effectively prohibits competition among S & H licensee-retailers in offering S & H stamps. Likewise, it prevents competition between S & H licensees and retailers who may offer other brands of trading stamps. *United States* v. *Parke-Davis & Co.*, 362 U.S. 29; *Dr. Miles Medical Co.* v. *John V. Parke & Sons*, 220 U.S. 373.

A second and more onerous aspect of the price-fixing practice is the fact that the price of the products or merchandise may ultimately be fixed after the tying sale has occurred. The trial court found:

> "The stamps can only be redeemed in merchandise offered and provided by Sperry and Hutchinson Com-

pany in units determined by Sperry & Hutchinson Company at prices (per unit), fixed by Sperry & Hutchinson Company . . ." (R. 622).

Consequently, even if a retailer-licensee were to depart from the licensing agreement by distributing S & H stamps at a rate other than one stamp per 10 cents of retail sales, the power to fix the price of the redemption merchandise has been retained by S & H. This means that once a purchaser has obtained the stamps, he is assured of no fixed value, since they are not redeemable in cash and, at any time prior to redemption, S & H may change or fix the redemption value of the stamps for which merchandise will be delivered.

This unusually questionable arrangement lies somewhere in the realm beyond the practices considered in *Dr. Miles Medical Co.* v. *John V. Park and Sons Co.*, 220 U.S. 373, and in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346. The criticism voiced by this Court in both cases is apposite in that S & H not only determines the price at which the stamps are distributed to its licensee-retailers but also fixes the effective price at which they are distributed to consumers. This is accomplished by (1) fixing the rate of distribution and (2) by fixing the redemption value after the tying sale has occurred.

It is by means of the licensing agreement that the vertical price-fixing combination is established and the practice squarely falls within the ambit of the criticism voiced by the courts. *United States* v. *The White Motor Co.*, 194 F.Supp. 562. See discussion on the practice in *The White Motor Co.* v. *United States*, 372 U.S. 253.

From the uncontroverted evidence, S & H has established a vertical combination which results in fixing prices and values on its merchandise after the purchaser has paid for and received the stamps. Such an arrangement is clearly proscribed as a restraint of trade under Section 1 of the Sherman Act (15 U.S.C. § 1).

CONCLUSION

The attempt by the Sperry and Hutchinson Company to prevent free transfer of trading stamps after their distribution to a customer in a retail sale violates Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 3 of the Clayton Act (15 U.S.C. § 14). The prohibition on transfer is integral to the scheme of S & H which creates an illegal tying arrangement and an unlawful retroactive price-fixing combination.

The decision of the Oklahoma Supreme Court erroneously applied the federal laws and thereby sustained a method of operation acting in restraint of trade.

The substantial impact of these practices on the consuming public and the Rances requires relief. The absence of prior definitive decisions necessitates consideration of these issues by the Court. Finally, the attempted restriction on free transfer of trading stamps operates in such flagrant opposition to federal law and the principles enunciated by this Court that the lower court should be reversed.

The Rances respectfully pray that the injunction against them be set aside and that the cause be reversed

and remanded with instructions to enter appropriate injunctive relief in petitioner's favor.

Respectfully submitted,

JOHN H. CANTRELL
2120 First National Building
Oklahoma City, Oklahoma

JAMES D. BATCHELOR
707 North Robinson
Oklahoma City, Oklahoma

Attorneys for Petitioners

September, 1965

APPENDIX

APPENDIX A

FILED
IN SUPERIOR COURT
Oklahoma County, Okla.
NOV 2 1962
Dale Smith, Court Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE SPERRY AND HUTCHINSON COMPANY,)
)
Plaintiff,)
)
-vs-) No. 368
)
)
WILLIAM RANCE AND RUTH V. RANCE,)
d/b/a TRADING STAMP EXCHANGE,)
)
Defendants.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon the pleadings filed, the proceedings had and the testimony and evidence adduced herein, and at the special instance and request of the parties, the Court finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. The plaintiff is a New Jersey corporation engaged in the trading stamp business. It has been engaged in this business throughout the United States since 1896. It is qualified to do and has done business in the State of Oklahoma since 1911.

2. The parties have stipulated, with the Court's approval, to waive their claims and cross-claims for damages, each against the other, up to the date of the judgment herein, but each reserves the right to prove such damages as pertinent to the equities involved in the cause.

3. Plaintiff does an interstate business involving its business activities in 47 states of the United States. It is excluded from Kansas entirely by law. In Washington, Wisconsin and Wyoming it is required by law to redeem its "cash discount" stamps for cash. In 13 other states it is required to afford the customers of its licensees options to take merchandise or cash.

4. The defendants are individuals engaged in conducting the business of a trading stamp exchange at 100 Northwest 22nd Street, Oklahoma City, Oklahoma, called the Trading Stamp Exchange.

5. In the conduct of its business, the plaintiff enters into license contracts with retail merchants offering a variety of goods and services, and grants to each licensee in a particular line of business the exclusive right to its S&H Cooperative Cash Discount System within his competitive area. S&H has over 70,000 licensees throughout the United States. It has approximately 1,000 licensees in the State of Oklahoma, about 300 of which are in Oklahoma City.

6. Plaintiff's method of doing business throughout at least 29 states of the United States and particularly in Oklahoma, and as to the Oklahoma portion of its interstate business and as to its intrastate business in Oklahoma is substantially as follows:

(1) Plaintiff contracts in writing with its licensees, who are usually vendors of merchandise or services, some 70,000 in the United States and 1,000 in Oklahoma, 300 of which are in Oklahoma City, Oklahoma, whereby it agrees, inter alia to supply S&H Green

Trading Stamps to said licensees at stipulated prices. These contracts, at least in most instances in 29 states, including Oklahoma provide that:

(a) Title to the stamps is reserved in Sperry and Hutchinson Company;

(b) The stamps can only be redeemed if pasted in a booklet of 1200 stamps and surrendered to Sperry and Hutchinson Company at one of its Redemption Centers, and;

(c) The stamps can only be redeemed in merchandise offered and provided by Sperry and Hutchinson Company for such purposes in units determined by Sperry and Hutchinson Company at prices (per unit) fixed by Sperry and Hutchinson Company;

These contracts contain no commitment or covenant of the licensees that they will furnish or deliver the booklets for pasting purposes to the customer and such is not usually done until the customer requests the booklet, at some later time, if at all, after he has received stamps.

(2) Plaintiff provides "Redemption Centers," some 14 in Oklahoma, stocked with merchandise selected by Sperry and Hutchinson Company which it offers for redemption of stamps at retail prices fixed by Sperry and Hutchinson Company and acquired by it under contracts with its suppliers which it chooses and at prices which it negotiates and determines.

(3) Periodically, Sperry and Hutchinson Company composes, has printed, issues and distributes its "catalog," delivered to large numbers of the holders of the stamps through Plaintiff's licensees, in and by which Sperry and Hutchinson Company advises what mer-

chandise it has for redemption of stamps and what the unit price for same is as determined by Sperry and Hutchinson Company.

(4) If, as and when booklets containing the required number of stamps are surrendered in plaintiff's specified units at plaintiff's rates, the merchandise selected by the holder of the stamps, within the limited offering by Sperry and Hutchinson Company, is delivered to the holder of the stamps.

7. The plaintiff expends annually many millions of dollars in extensive national and local advertising and publicizing the desirability and the benefits of the S&H service to S&H stamp collectors. This advertising has created extensive good will and public acceptance for the service. There are more than 33,000,000 S&H stamp collectors in the United States about 300,000 to 400,000 of these collectors live in Oklahoma.

8. The front cover of the S&H stamp collectors' book contains a notice that neither S&H stamps nor collectors' books are sold to S&H licensees, S&H stamp collectors or any other persons and at all times the title thereto is expressly reserved to S&H; that the only right S&H stamp collectors acquire in S&H stamps is to paste them into S&H stamp collectors' books and present them to S&H for redemption; that S&H stamp collectors must not dispose of S&H stamps or collectors' books or make any further use of them without S&H's consent in writing; that if S&H stamps or collectors' books are transferred without such consent, S&H reserves the right to restrain their use by or take them from the persons to whom they are transferred and that the use of S&H stamps and collectors' books is restricted to S&H licensees and their customers.

9. In one state, Kansas, plaintiff is prohibited by law from carrying on its business. In three others, Washington, Wisconsin and Wyoming, plaintiff is required by statute

to redeem the stamps in cash. In thirteen (13) other states the statutes require that the stamps be redeemed by plaintiff either in cash or merchandise—at the option of the holder.

10. The defendants buy and sell S&H stamps, exchange S&H stamps for other brands of trading stamps and other brands of trading stamps for S&H trading stamps, for a fee, and advertise by newspaper, radio and other media that they conduct a trading stamp exchange.

11. The defendants are not S&H licensees, nor has S&H consented to their trafficking in its stamps. The plaintiff has demanded that the defendants cease trafficking in its stamps. The defendants have refused to do so.

12. S&H stamp collectors are familiar with the operation of the S&H system and with S&H's requirement that they must paste S&H stamps into S&H stamp collectors' books before S&H will redeem them.

13. If S&H stamp collectors could obtain S&H stamps from sources other than S&H licensees, the value of the S&H service to S&H licensees would be substantially reduced.

14. The defendants' trafficking in S&H stamps and collectors' books is injurious to the plaintiff's business and property in that it interferes with its right to select its licensees, to maintain the value of its stamps, to control the distribution and issuance of its stamps, and to provide a system of promotional and advertising value to its licensees.

15. Plaintiff's licensees are not prohibited by contract from contracting with other stamp companies.

16. Four other major trading stamp companies are engaged in business in Oklahoma and this competitive feature of the plaintiff's business has created the business of defendants.

[APPENDIX]

CONCLUSIONS OF LAW

1. Plaintiff's licensee contracts and mode of operation are not violative of the Anti Monopoly laws of the State of Oklahoma (79 OSA 1, et seq.) nor void as an unlawful purpose or contrary to public policy (15 OSA 104, 211 et seq.)

2. The plaintiff by notice contained in its license contracts, the pads in which it supplies its stamps to its licensees and in its stamp collectors' books has retained title to its stamps and made them non-transferable.

3. The only right which S&H licensees have in S&H stamps is to issue them to their customers pursuant to the provisions of the S&H license contract. The only right which S&H stamp collectors have in S&H stamps is to transfer them to S&H for redemption in merchandise; the collectors have no right to transfer them to any other person, firm or corporation without the permission of S&H, in writing.

4. The defendants' trafficking in S&H stamps constitutes unfair competition, misappropriation of plaintiff's good will and unjustified interference with its contracts with its licensees and with its stamp collectors.

5. The defendants' trafficking in S&H stamps causes and will continue to cause the plaintiff irreparable injury.

6. The plaintiff has no adequate remedy at law.

7. The plaintiff is entitled to the relief of permanent injunction.

IT IS THEREFORE ORDERED that a judgment granting injunctive relief be entered in accordance herewith.

DATED this 26th day of October, 1962.

G. MICHAEL TAPP
Judge of the Superior Court

APPROVED AS TO FORM:

G. M. Fuller
Attorney for Plaintiff

Objections to inadequacy, incompleteness and insufficiency reserved.

John H. Cantrell
Attorney for Defendants

APPENDIX B

FILED
IN SUPERIOR COURT
Oklahoma County, Okla.
NOV 26 1962
Dale Smith, Court Clerk
By ---------- Deputy

IN THE SUPERIOR COURT IN AND FOR
OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE SPERRY AND HUTCHINSON COMPANY,	)	
Plaintiff,	)	
-vs-	)	NO. S-368
WILLIAM RANCE and RUTH V. RANCE, doing business as TRADING STAMP EXCHANGE.	)	
Defendants.	)	

ORDER SUSTAINING IN PART AND OVERRULING IN PART MOTION TO MODIFY AND SUPPLEMENT FINDINGS OF FACT

On this 21st day of November, 1962, the Motion of the defendants, William Rance and Ruth V. Rance, to modify and supplement the Findings of Fact herein coming on to be heard and the said defendants appearing by their attorney, John H. Cantrell, and the plaintiff appearing by its attorney, John L. Smith, the Motion is duly presented to the Court.

Upon consideration of said Motion and argument of counsel thereon, the Court finds and orders that the Findings of Fact made and entered by the Court in this

cause and dated the 26th day of October, 1962, be, and the same are, amended and supplemented by the addition of the following Finding of Fact inserted in Finding of Fact No. 6.(1) as subparagraph (d), to-wit:

> (d) During the calendar year 1961 S&H stamp collectors redeemed merchandise from plaintiff's redemption centers located in Oklahoma of the approximate retail value of 4 million dollars which merchandise had a cost value to plaintiff of approximately 2 million dollars.

Plaintiff excepts and exception allowed.

The Court further finds and orders that each and every other portion of said Motion of said defendants should be and is overruled and denied and the defendants allowed exceptions.

G. Michael Tapp

Judge of the Superior Court of Oklahoma County, Oklahoma and agreed Special Judge of the District Court of Oklahoma County, Oklahoma

O.K. as to form:
John L. Smith
Attorney for Plaintiff

O.K. as to form:
John H. Cantrell
Attorney for Defendants.

APPENDIX C

FILED
IN SUPERIOR COURT
Oklahoma County, Okla.
NOV 2 1962
Dale Smith, Court Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE SPERRY AND HUTCHINSON COMPANY,)
)
Plaintiff,)
)
-vs-) No. 368
)
)
WILLIAM RANCE and RUTH V. RANCE,)
d/b/a TRADING STAMP EXCHANGE,)
)
Defendants.)

JOURNAL ENTRY

This matter coming on for hearing this 5th day of September, 1962, the plaintiff appearing in person and by its counsel, G. M. Fuller and John L. Smith, of Fuller, Smith, Mosburg & Davis, and the defendants appearing in person and by their counsel, John H. Cantrell, of Cantrell, Thompson, Douglass & Wilson, and the Court having examined the pleadings, heard the testimony of witnesses sworn and examined in Open Court, heard the arguments of counsel and made its Findings of Fact and Conclusions of law, which have been filed herein, it is

ORDERED:

1. That the activities of the defendants in buying, selling, trading and exchanging S&H Green Stamps causes and will continue to cause the plaintiff irreparable injury;

2. That the plaintiff has no adequate remedy at law;

3. That the plaintiff is entitled to the relief of permanent injunction; and

4. That the defendants, William Rance and Ruth V. Rance, be and they hereby are permanently enjoined from advertising or otherwise offering to buy, sell, trade or exchange, and are enjoined from buying, selling, trading or exchanging or dealing in any other way with S&H Green Stamps, either in person or through their agents, servants, employees or associates, or in any other manner.

Dated this 26th day of October, 1962.

G. MICHAEL TAPP
Judge of the Superior Court

OK:
G. M. Fuller
Attorneys for Plaintiff

OK: As to form only.
John H. Cantrell
Attorneys for Defendants

To all of which the defendants herein objects which objections are overruled and exceptions allowed.

G. MICHAEL TAPP

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

William Rance and Ruth V. Rance,	)	
	)	
Plaintiffs in Error,	)	
	)	
vs.	)	No. 40,423
	)	
The Sperry and Hutchinson Company, a corporation,	)	
	)	
Defendant in Error.	)	

SYLLABUS

1. The trading stamp business, as generally conducted in the State of Oklahoma, when honestly conducted, is not against public policy.
2. The issuance of trading stamps in the usual and customary manner in Oklahoma, constitutes a device for giving a discount for cash; the one who receives such stamps does not receive a cash discount, but a redeemable discount in merchandise (represented by stamps) for paying cash.
3. A trading stamp when issued in the usual and customary manner does not constitute ordinary property, a negotiable instrument or an article of commerce, as those terms are generally used; but, in effect, is an "instrument" employed by a trading stamp company to conduct a business which is in the nature of a sale to its licensees of a promotional or an advertising service.

4. An inherent characteristic of a trading stamp business requires that a trading stamp company maintain certain controls over the "instruments" employed in the conduct of its business, whether such "instrument" be trading stamps, contractual agreements, the merchandise at its redemption center, or any other integral part of its business.

5. Where a trading stamp company grants, by contract, exclusive rights to retail merchant, who is engaged in a particular line of business in a competitive area, to issue its trading stamps, such method of operation springs from business requirements and if it does not prevent others from lawfully engaging in similar enterprises, does not restrain trade or create a monopoly, which is against public policy, such method of operation is not in violation of any State or Federal laws when honestly conducted.

6. Until a commercial arrangement, or a method of doing business, reaches a stage where the needs of the public are restricted to the point where the public is exposed to the evils sought to be prohibited by law, or such restriction is contrary to the genius of free government, such arrangement, or method of doing business, is not against public policy.

7. Whether injunctive relief is to be granted in an action in equity is a matter within the sound legal discretion of the court, to be determined in the light of all the facts and circumstances, and each case must be construed in the light of its own particular facts.

8. Where a trading stamp company is legally and honestly conducting a trading stamp business and has created the value of and demand for its stamps and another party seeks to attract customers and build up his own business by buying and selling such stamps, exchanging them for other brands of trading stamps, exchanging

other brands of trading stamps for such stamps and appropriates the stamp company's good will, without payment to or the consent of the trading stamp company; and such party's "trafficking" in such stamps, is injurious to the trading stamp company's business and property, in that it interferes with its right to select its licensees to issue its stamps, to maintain the value of its stamps, to control the distribution and issuance of its stamps, and to provide a promotional and advertising value to its licensees; and the stamp company has no adequate remedy at law; the stamp company is entitled to a permanent injunction enjoining said party from "trafficking" in its stamps as articles of commerce.

9. The findings of the trial court should be strongly persuasive, and should not be set aside unless this Court can say, in equity and good conscience, that the conclusions reached by the trial court are against the clear weight of the evidence.

APPEAL FROM SUPERIOR COURT OF OKLAHOMA COUNTY, OKLAHOMA

Hon. G. Michael Tapp, Judge.

The Sperry and Hutchinson Company, a trading stamp company, commenced proceedings against plaintiffs in error from "trafficking" in its stamps as articles of commerce. The trial court granted a permanent injunction as prayed for and plaintiffs in error appealed from the order overruling its motion for a new trial.

AFFIRMED

Cantrell, Douglass, Thompson & Wilson,
By John H. Cantrell,
2120 First National Building,
Oklahoma City 2, Oklahoma,

For Plaintiffs in Error,

W. J. Holloway,
G. M. Fuller,
Fuller, Smith, Mosburg, Davis & Bowen,
2500 First National Building,
Oklahoma City 2, Oklahoma

Of Counsel:

Casey, Lane & Mittendorf,
26 Broadway,
New York 4, New York,

John F. Joyce,
Roger H. Lloyd

For Defendant in Error.

IRWIN, J.:

The Sperry and Hutchinson Company, referred to as plaintiff, is engaged in the trading stamp business and by written contract, it licenses the use of its S&H trading stamp service to certain retail merchants, referred to as licensees. The licensees offer and issue the stamps to their customers when the customers purchase merchandise at the licensees' places of business. The customers who receive the stamps will be referred to as collectors.

William Rance and Ruth V. Rance, d/b/a Trading Stamps Exchange, referred to as defendants, buy and sell S&H stamps, exchange S&H stamps for other brands of trading stamps, and exchange other brands of trading stamps for S&H stamps. Briefly stated, defendants conduct a business of "trafficking" in trading stamps.

Defendants are not licensees of plaintiff and plaintiff has not consented to defendants' "trafficking" in its stamps. Plaintiff commenced this proceeding to permanently enjoin defendants from "trafficking" in S&H stamps.

The trial court, in its journal entry of judgment, permanently enjoined defendants "from advertising or other-

wise offering to buy, sell, trade or exchange," and "from buying, selling, trading or exchanging or dealing in any other way with S&H Green Stamps, either in person or through their agents, servants, employees or associates, or in any other manner."

The defendants have appealed from the order overruling their motion for a new trial.

FACTS

The defendants buy and sell S&H stamps, exchange S&H stamps for other brands of trading stamps and exchange other brands of trading stamps for S&H stamps, for a fee, and advertise by newspaper, radio and other media that they conduct a trading stamp exchange.

Plaintiff does an interstate business in forty-seven states in the United States and has done business in Oklahoma since 1911. In the conduct of its business, plaintiff enters into license contracts with retail merchants (licensees) offering a variety of goods and services, and grants to each licensee in a particular line of business within a competitive area the exclusive right to offer and issue S&H stamps. There are approximately 70,000 licensees throughout the United States and approximately 1,000 licensees in Oklahoma.

Plaintiff's method of doing business generally, and particularly in Oklahoma, is as follows: It contracts in writing with its licensees, whereby it agrees, inter alia, to furnish the licensees advertising signs; to furnish for distribution by the licensee the collectors' books which are books in which the collector pastes his stamps; and to redeem the stamps when collected and presented as prescribed. The licensee agrees to advertise the fact that it issues S&H stamps; to pay a stipulated price for a certain number of stamps; and to offer S&H stamps to all customers making cash payments.

The collector's books are offered to the collectors at the licensee's place of business. The stamps must be pasted in a collector's book before plaintiff redeems the stamps for merchandise selected by the collector. The stamp contains no language that title to the stamps remain in the plaintiff or that the stamps are not transferable and plaintiff's advertising does not so disclose. However, printed on the inside of the cover sheet of the collector's book is the following:

"NOTICE

"S & H Green Cooperative Cash Discount Stamps when redeemed in accordance with conditions printed below are your compensation for cash payments made.

"All S & H Green Cooperative Cash Discount Stamps now or hereafter issued by The Sperry and Hutchinson Company are subject to all the provisions of the contracts between this Company and the merchants who issue them, and the following rights and conditions, which are expressly reserved by the Company, which the persons acquiring them expressly accept, and which are a part of all contracts between this Company and its merchants, and are binding on the merchants' customers.

"Neither the stamps nor the books are sold to merchants, collectors or any other persons, at all times the title thereto being expressly reserved in the Company, and the right to possession thereof is reserved to it, subject to the rights of the merchants and their customers under the contracts with the Company. The stamps are issued to you as evidence of cash payment to the merchants issuing the same. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any further use of them without our consent in writing. * * *."

"The stamps when received by you must be pasted in the book, as that is the method we have adopted for the purpose of preventing their further use. The use of our stamps is restricted to our merchants and their customers."

A catalogue, known as an "Ideabook," is available at the licensee's place of business for the collectors. The "Ideabook" contains pictures of the merchandise available at plaintiff's redemption centers and the number of collector's books filled with stamps necessary to acquire the desired merchandise.

The plaintiff and its licensee agree that title to the stamps shall remain in plaintiff and shall not in any event pass to the licensee or any other person or firm and that the license to issue the stamps is personal to the licensee and that it may not be transferred or assigned.

The contracts between the plaintiff and its licensee does not prohibit the licensee from contracting with other stamp companies to issue the other company's stamps.

Plaintiff provides "redemption centers" and has approximately 14 in Oklahoma. The plaintiff spends millions of dollars annually in extensive national and local advertising, publicizing the desirability and the benefits of the S&H service to S&H stamp collectors and there are more than 33,000,000 S&H stamp collectors in the United States and between 300,000 to 400,000 in Oklahoma.

In the trial court's order sustaining in part and overruling in part defendants' motion to modify and supplement findings of fact, the trial court found that during the calendar year 1961, S&H stamp collectors redeemed merchandise from plaintiff's redemption centers located in Oklahoma of the approximate value of 4 million dollars which merchandise had cash value to plaintiff of approximately 2 million. In this connection, the trial court made no finding as to plaintiff's cost of operation in Oklahoma.

PROPOSITION I

Defendants contend that any collector, who acquires stamps through purchase of merchandise or payment therefor, acquires the title of such stamps and an attempted restraint of alienation is unenforceable; that if such collector has the title and ownership with the necessary incidents thereto, including the right of transfer, defendants have the right to acquire the stamps from the collectors; and if the collector has the right to sell or exchange them, defendants have the right to acquire, sell or exchange them.

In this connection, defendants argue that the stamps are "articles of commerce" and the attempted reservation of title by plaintiff, in its contracts with its licensees, is a "restraint of trade"; and since the stamps represent a "cash discount" they become immediately "articles of commerce" when issued the same as warehouse receipts, promissory notes or other commercial paper.

Plaintiff argues that it retains title to the stamps and the only rights a collector has in the stamps are for redemption purposes, and that it is entitled to an injunction enjoining defendants from "trafficking" in its stamps.

The S&H green stamp contains this legend on its face, "Sperry & Hutchinson Discount for Cash." In Safeway Stores v. Oklahoma Retail Grocers Ass'n., Okl., 322 P.2d 179, which involved the Oklahoma Unfair Sales (Practice) Act, Title 15 O.S. 1961, Sec. 598.1, et seq., we held that giving trading stamps in the usual and customary manner, constituted "a device for giving a discount for cash." In other words, a collector does not receive a "cash discount," but receives a redeemable discount in merchandise (represented by stamps) for paying cash. The issue involved here is whether defendants may be enjoined from "trafficking" in the redeemable discounts (the stamps) as

articles of commerce, which a collector receives from a licensee.

Defendants cite the case of Merchants' Legal Stamp Company v. Murphy, 220 Mass. 281, 107 N.E. 968, as a "bay horse case" to support their theory that when the stamps are issued, they become "articles of commerce" and that plaintiff is not entitled to an injunction enjoining them from "trafficking" in "articles of commerce." The first headnote in the above case states:

> "Trading stamps and books are 'articles' within St. 1908, c. 454 § 1, providing that every agreement in violation of common law is illegal and void, if thereby a monopoly in the production or sale of any article or commodity tends to be created."

Although the above case holds that trading stamps are "articles" within the cited statute, an examination of the opinion and the second headnote discloses that the method employed by the stamp company in conducting its business was the controlling factor. In the second headnote it is stated:

> "Where the direct and intended effect of methods employed by plaintiff in conducting a business in trading stamps was to prevent others from lawfully engaging in similar enterprises, the contract of the plaintiff with defendant as to use of stamps which embodied such monopolistic features of the plaintiff's business was within St. 1908, c. 454, § 1, providing that every agreement in violation of common law, in that thereby a monopoly in the production or sale of any article or commodity is created, is illegal and void."

In the above case it is stated that under the stamp company's operation, it controlled nearly ninety per cent of the actual stamp business in the Boston area. The stamp company would decline to supply stamps unless its licensees would stipulate that they would not use trading

stamps issued by other stamp companies, and the court found that this provision was to suppress all competition and said: "The monopoly it seeks to establish may not be complete but it has gone far enough to eliminate any effective rivalry. The restriction is not confined to the sale or transfer to a business rival of plaintiff, but the merchant or collector cannot dispose of book or stamps to anyone even if their retention unused must result in pecuniary loss. Indeed this is an essential and controlling feature of the contract, which differs materially from the contract in Gagnon v. Sperry & Hutchinson Co., 206 Mass. 547, 92 NE 761."

In the instant case the trial court found that there are four other major trading stamp companies in Oklahoma and this competitive feature of plaintiff's business has created the business of defendants. This finding is not against the clear weight of the evidence. In other words, plaintiff's method of operation does not prevent others from engaging in similar enterprises for in Oklahoma there are five major trading stamp companies and the stamp business in Oklahoma is competitive.

In the instant case, plaintiff's licensees are not prohibited from contracting with other stamp companies—there, the licensees were prohibited. The contract in the instant action provides that upon termination thereof the plaintiff "shall repay to the licensee any amount thereof paid by him, for its services and for the use of its system, measured by the number of stamps remaining unused and so returned, * * *." In the Merchants' Legal Stamp Company case, the licensee could not dispose of the stamps to anyone, even if their retention resulted in a pecuniary loss.

The method by which Merchants' Legal Stamp Company conducted its business in Massachusetts was monopolistic. In Sperry & Hutchinson Co. v. McBride, 30 NE 2d 269, the Supreme Judicial Court of Massachusetts, in effect, recognized the legality of the method by which plain-

tiff was conducting its stamp business. As will be hereinafter shown, plaintiff's method of conducting its business in Oklahoma is not monopolistic or in violation of any State or Federal Laws.

In Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 Fed. Rep. 833, it was held that Sperry & Hutchinson had the right to restrict the use of the stamps by contract, and the stamps, having been once issued by a merchant, were functus officio, except for redemption, and, though transferable for that purpose, defendants' use thereof was improper interference with Sperry & Hutchinson's business, which it was entitled to restrain. In that case the court said:

> "The trading stamp, when issued, represents a closed transaction between the merchant and the company, as well as an outstanding obligation to redeem the stamp. As a token or voucher of the sale and use of so much advertising, the trading stamp is necessarily a consumable article—an article designed for a single use in an advertising scheme. What the defendants wish to do is to procure for themselves a trade advantage as distributors of trading stamps. Although the stamps have been issued to collectors for a limited purpose, the defendants desire to use them for a purpose for which obviously they were not intended in the hands of a collector. * * *. The defendants have devised the scheme of procuring from individual collectors a very large number of the stamps, and, by uniting in a single hand what ordinarily would be distributed in many hands, they secure a supply sufficient for advertising purposes. In other words, as transferees of the rights of persons who did not acquire these stamps for advertising purposes, they secure for themselves the ability to do what is not intended that a collector of the stamps should do. * * *. By reusing the stamps as an advertisement, they seek to get for

nothing what others are required to pay for, and institute a destructive competition with authorized merchants, which tends to destroy the value of the stamps, and to injure the complainant's (Sperry & Hutchinson) business."

Defendants' counsel argued the above case on the theory that the court could disregard entirely the rights of Sperry & Hutchinson and its licensee, and that, "although both of these parties have expended their money in expectation of a benefit, this benefit may be destroyed by defendants." In turning down this contention, the court said that defendants could acquire no greater rights than the customer-collector had, and that if they did reissue them, they were appropriating for themselves, and without consideration, what fairly belonged to the licensee and Sperry & Hutchinson. The court stated that a trading stamp is not ordinary property. It is sui generis and an artificial creation. And we find this statement: "While a transfer of ordinary property by the owner upon any terms usually deprives other persons of no rights, this is not always the case with the trading stamps. While it may be transferred in any way which confines its use within the purpose for which it was issued, it may not be transferred in such a way as to destroy its value as an instrument of special trade advantage or advertising, or as to deprive the company which created the value of the stamp, and which has assumed the obligation to redeem it, of its right to compensation for expenditures and for redeeming the stamps."

In the above case the court found that defendants knew that the stamps were issued to customers for a certain purpose—that is, for redemption. Defendants in the instant action have knowledge of the method by which plaintiff conducts its business.

In Sperry & Hutchinson v. Temple, 137 Fed. Rep. 992, defendant Temple knew of the manner in which Sperry &

Hutchinson conducted its business and the court held Temple was not an innocent purchaser without notice in purchasing issued stamps for resale. The court further held:

> "The business of issuing trading stamps to merchants to be given to purchasers of small bills for cash redeemable in articles of merchandise, etc., when honestly conducted, is not contrary to public policy.
>
> "Where defendant purchased complainant's trading stamps, among others, for resale, and such purchases seriously interfered with complainant's business in issuing such stamps for redemption in articles of merchandise, etc., complainant was entitled to an injunction prohibiting defendant from advertising that he would purchase complainant's stamps, and from selling stamps so purchased as articles of merchandise."

In the above case the Court said: "* * * The nature of the business requires that there should be a certain monopoly. If the stamps were on the market generally, thus opening the business extensively, no merchant would have an inducement to deal with the complainant. Therefore, by the very nature of the business, the stamps are not intended to be dealt with by the public generally, and are not transferable in the general and ordinary sense of the word. * * *."

In Sperry & Hutchinson Co. v. Louis Weber & Co., 161 Fed. Rep. 219, the court held:

> "Complainant issued trading stamps to merchants under contracts providing that they should be given out only to cash customers as premiums on purchases, and when presented by such customers in books would be redeemed by complainant in goods. They were nontransferable on their face, and the books were supplied by complainant and contained advertisements of the merchant's business. Held, that the business and

contracts were lawful, and that complainant was entitled to protection by injunction against a rival in the business, which sent out agents to purchase or exchange its own stamps for partly filled books containing complainant's stamps, some of which were again resold at a low price, materially interfering with complainant's business."

In the body of the opinion we find this language:

"It is the essence of complainant's business that its subscribers shall get the full benefit of its methods of advertising and assistance. Its stamps are not, in the full sense, property. Their nontransferability is an essential element of their value, both to complainant and its subscribers. It may be assumed that both parties are in the transaction for profit. It is not fair to say that complainant's only interest consists in the presentation of the stamps for redemption, if the means employed to that end result in killing the demand of subscribers for the stamps. The parties are entitled to carry on their affairs in such a way as to serve the business interests of each, so long as they are lawfully conducted. To create an unfair market for partly filled and nontransferable stamp books would have a tendency to keep purchasers from trading with subscribers until they were filled. This has been held in a number of cases instituted by complainant to protect its business. Among these are the Cases of Mechanics' Clothing Company (C.C.) 128 Fed. 800, 1013 (same in (C.C.) 135 Fed. 833), Brady (C.C.) 134 Fed. 691, Beal (C.C.) 145 Fed. 659, Asch (C.C.) 145 Fed. 659, and Temple (C.C.) 137 Fed. 922. In addition there are unpublished opinions and decisions to the same effect by Judge Morris of Baltimore, Judge McPherson, Eastern district of Pennsylvania, Judge Thomas, Eastern district of New York, and Judge Lacombe, Southern district of New York."

[APPENDIX]

In Sperry & Hutchinson v. Fenster, 219 Fed. Rep. 755, an injunction was granted in favor of Sperry & Hutchinson, and in granting such injunction, the court held:

> "Act Cong. October 15, 1914, c. 321 § 3, 38 Stat. 731, prohibiting the making of a contract fixing the price for merchandise on condition that the lessee or purchaser shall not use or deal in the merchandise of a competitor, if the effect of the contract is to substantially lessen competition or tend to create a monopoly, does not prohibit a trading stamp concern from restricting redemption privileges to subscribers under contract with it binding such customers to distribute stamps only to customers."

In the body of the opinion we find this statement:

> "* * * the sale of trading stamps is much more like the transactions considered in Henry v. A. B. Dick Co., 224 U.S. 1, 32 Sup. Ct. 364, 56 L.Ed. 645, Ann. Cas. 1913D, 880, in that the reason for insisting upon a contract is to restrict the sharing in a certain legitimate privilege, to those who pay for the privilege, and to prevent, by a mere transfer of the trading stamps, the bestowal of the advantage of giving out the stamps, and of getting trade thereby, upon any person who might by holding the stamps be entitled to claim the rights of redemption.
>
> "It is evident that the intent and acts of persons taking the stamps and seeking to redeem them for a certain premium, and also the resultant benefits to that person, are entirely different and are based upon substantially different rights *from those of a party who is seeking to attract customers and to build up his own trade through the privilege of dealing, as it were, in trading stamps, without payment for that privilege and with no intention of getting the goods for which the stamps are redeemable.*

"The right to redeem the stamps is a property right transferable by possession while the license to use them for advertising purposes is not transferable without compensation to the person granting that right, viz., the plaintiff herein." (emphasis ours).

In the instant action, defendants are seeking to attract customers and to build up their own trade through the "trafficking" in plaintiff's trading stamps, without payment for that privilege and without intention of getting the goods for which the stamps are redeemable.

In Sperry & Hutchinson Co. v. Siegel, Cooper & Co., 140 NE 864, the Supreme Court of Illinois said that stamps were not negotiable instruments and the "purpose of the provision concerning their redemption was to aid the one who issued them in establishing a closer and continuous relation between himself and his customers by having the customers redeem the coupons. No one else has any right to traffic in these stamps. By numerous cases in this country, by which appellant here sought to enforce the nontransferability of such stamps, such feature has been sustained." The court then cited the Weber Mechanics Clothing Co. and Fenster cases herein before discussed.

In State By Richman v. Sperry & Hutchinson Co., the State commenced proceedings against the stamp company to require escheat of the cash value of unredeemed stamps. The Superior Court, Chancery Division, 49 N.J. Superior Ct. 165, 139 A2d 463, rendered judgment for the stamp company. On appeal to the Appellate Division, 153 A2d 691, in affirming the judgment, the court recognized the fact that a housewife may redeem in her own book all of the stamps collected by individual members of her family and said the State's rights are no greater than that of each stamp holder. However, the court said the stamps were not freely transferable without the stamp company's consent because the collector is so apprised both by legend

on the reverse side of the stamps and by the "notice" in the stamp books. The above decision was affirmed by the New Jersey Supreme Court in 31 N.J. 385, 157 A2d 505, for the reason stated in 153 A2d 691.

In the instant action, plaintiff and defendants submit and rely upon diametrical theories. Plaintiff's theory is that it has title to the stamps at all times, and since it has title to them, the same may not be sold or exchanged without its consent; and, the only rights a collector has in trading stamps issued to him by a licensee is the right of redemption and if a collector should transfer his right of redemption to another person without its consent, plaintiff would not be obligated to redeem the stamps. On the other hand, defendants' theory is that after the trading stamps have been issued by a licensee to a collector, such stamps immediately become articles of commerce and can be sold and exchanged as ordinary property; that plaintiff has no interest in the stamps after the same have been issued to a collector, but only an obligation of redemption; and since plaintiff has no interest, but only an obligation to redeem, it can not enjoin the sale and exchange of the stamps as ordinary property or articles of commerce.

In analyzing the stamp cases we find the courts have recognized that one of the inherent and necessary characteristics of the trading stamp business requires that a stamp company maintain certain controls over the trading stamps and that its interest in the stamps after the same have been issued to a collector is more than an obligation to redeem. In other words, the courts have recognized that if trading stamps when issued in the ordinary and usual manner, immediately become ordinary property and could be sold and exchanged as such, such uses would be so inconsistent with the purposes for which the same were issued, and so destructive to a legal method of doing business, that such action should be enjoined.

We can only conclude that trading stamps, when issued in the ordinary and usual manner to a collector, do not constitute ordinary property or articles of commerce as those terms are generally used; but, in effect, is an "instrument" employed by a stamp company in conducting a business which is in the nature of a sale to its licensees of a promotional or an advertising service. The issue herein is whether plaintiff is entitled to an injunction enjoining the defendants from trafficking in S&H Stamps or the "instruments" employed by plaintiff to conduct its business as articles of commerce.

The trial court found that if S&H stamp collectors could obtain S&H stamps from sources other than S&H licensees, the value of plaintiff's service to S&H licensees would be substantially reduced; that defendants' trafficking in S&H stamps and collector's books is injurious to plaintiff's business and property in that it interferes with its right to select its licensees, to maintain the value of its stamps, to control distribution and issuance of its stamps, and to provide a promotional and advertising value to its licensees; and that four other major trading stamp companies are engaged in business in Oklahoma and this competitive feature of plaintiff's business has created the business of defendants.

In its conclusions of law the trial court found that defendants' trafficking in S&H stamps constitutes unfair competition, misappropriation of plaintiff's good will and unjustified interference with its contracts with its licensees and with stamp collectors.

We find the success of plaintiff's business depends upon the value of its services to its licensees and the number of stamps issued. Plaintiff, in its contract with its licensees, is obligated to advertise that its licensees issue S&H stamps; to advertise the benefits that the customers will receive by purchasing from the licensees; to furnish

collector's books; and to redeem the S&H stamps when collected and presented.

Plaintiff's contract with its licensees prohibt the licensees from disposing of the stamps in any manner other than as provided in the contract and the license to issue the S&H stamps is personal to the licensee and may not be transferred or assigned.

The contract right to offer and issue S&H stamps by the licensees and plaintiff's discharge of its obligations under its contract are, in effect, an advertising device which is beneficial to the licensees; the offering and issuing the S&H stamps is not merely to induce a single purchase but to provide an incentive for continued patronage, and the offering and issuing S&H stamps are inducements and incentives for trading at a licensee's place of business.

We find that if collectors could sell or purchase S&H stamps on the open market for cash, or could obtain such stamps from any and all retailers, whether such retailers had or did not have a license from plaintiff to offer and issue S&H stamps that the value of plaintiff's services to its licensees would be reduced; that it would reduce the tendency of a collector to patronize a licensee's place of business if one of the incentives was to obtain S&H stamps; that the value of plaintiff's services to its licensees (value of the stamps) would not be determined by contract between the plaintiff and its licensee, but would be determined by market conditions created by people unauthorized to traffic in S&H stamps but who do traffic in the same; and that plaintiff and its licensees have expended great sums of money to create a demand for S&H stamps and have created a means whereby the collectors can receive a benefit by patronizing a licensee who offers and issues S&H stamps. Plaintiff has also created the good will in connection with its stamps and defendants have appropriated this good will without the consent of and against the wishes of plaintiff.

We can only conclude that the trial court's findings are not against the clear weight of the evidence and that defendant's actions, by trafficking in S&H stamps, as articles of commerce, constitutes a wrongful and unwarranted interference with plaintiff's business.

In 28 Am. Jur., Injunctions, Sec. 70, page 566, it is said that, "The right to conduct a business, * * * without the wrongful interference of others is a property right which equity will, in a proper case, protect by injunction, provided, of course, the same is legal and not prohibited by law." In Paramount Pictures, Inc., v. Leader Press, Inc., 106 F.2d 229, the court said that, "* * * the right to carry on a lawful business is a valuable right which a court of equity will protect against unwarranted interference or undue obstructions." And, "* * * a court of equity will extend appropriate protection to intangible as well as tangible property which forms a part of a lawful business. Equity does not draw any distinction between the two kinds of property in respect of protection against wrongful invasion."

We can only conclude that plaintiff is entitled to an injunction enjoining defendants from trafficking in the S&H stamps as articles of commerce, and the judgment of the trial court should be affirmed if plaintiff is legally conducting its business. See Moral Insurance Company v. Fechtel, Okl., 280 P.2d 716.

PROPOSITION II

Defendants contend that the plaintiff's contracts with its licensees wherein plaintiff seeks to reserve title to the stamps are void and illegal and against public policy of the State and the United States because each contract is an integral part of a vertical combination in restraint of trade, and plaintiff violates the State and Federal anti-monopoly laws in the operation of its business based upon said contracts.

To sustain the above contention defendants cite Article 2, Sec. 32; and Article 5, Sec. 44, of the Oklahoma Constitution; and Title 79 O.S. 1961, Sec. 1 & 3; and the Federal Statutes prohibiting monopolies and cases construing the Sherman Anti-Trust Act. Under several sub-divisions the plaintiff argues the stamps are articles of commerce; attempted reservation of title to the stamps, which are articles of commerce, restrain trade by vertical combinations; restraints against alienation are illegal; monopoly by whatever means is condemned; vertical combinations are prohibited; "tying agreements" are illegally monopolistic; and there are no contractual rights between the plaintiff and the collectors.

Under the plaintiff's contracts with its licensees, the licensee purchases no commodity from the plaintiff for resale. The licensee does purchase, however, the services of plaintiff and the licensee is not prohibited from purchasing the services of another stamp company. The value of plaintiff's services to its licensee is, in effect, determined by the volume of business done by the licensee. The collector is not obligated to take the stamps offered by the licensee nor is he obligated to present for redemption the stamps he may obtain. The collector is under no obligation to the licensee or to the plaintiff, but the plaintiff is obligated to redeem the stamps in merchandise if the same are presented for redemption. The collector may enforce the obligation or he may ignore it by failure to present the stamps for redemption.

Without question, the method by which plaintiff conducts its business, restraints are placed on others from trafficking or trading in its stamps. However, the evidence does not disclose that plaintiff has monopolized the trading stamp business (the trial court found there were four other major stamp companies doing business in Oklahoma),

nor does the direct and tended effect of the methods employed by plaintiff prevent others from engaging in similar enterprises.

In Sperry & Hutchinson Co. v. Temple, 137 Fed. 992, it was held that the business of issuing trading stamps to be given to purchasers of small bills for cash, redeemable in articles of merchandise, etc., when honestly conducted, is not contrary to public policy; and, that the nature of the business required there should be a certain monopoly.

In Sperry & Hutchinson Co. v. Fenster, 219 Fed. 755, it was held that: "Act. Cong. October 15, 1914, c. 321, § 3, 38 Stat. 731, prohibiting the making of a contract fixing the price for merchandise on condition that the lessee or purchaser shall not use or deal in the merchandise of a competitor, if the effect of the contract is to substantially lessen competition or tend to create a monopoly, does not prohibit a trading stamp concern from restricting redemption privileges to subscribers under contract with it binding such customers to distribute stamps only to customers."

In Lorain Journal Co. v. United States, 342 U.S. 143, the Supreme Court of the United States said that in the absence of any purpose to create or maintain a monopoly, the Sherman Anti-Trust Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

In Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, it is stated that Section 1 of the Sherman Anti-Trust Act makes illegal any contract, combination or conspiracy in restraint of trade, and section 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce. The Court said, "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."

In the instant action, plaintiff does not follow a pattern or practice of refusing to deal with any particular merchant or group of merchants. As found by the trial court, plaintiff "* * * grants to each licensee in a particular line of business the exclusive right to its S&H Cooperative Discount System within his competitive area." If a licensee in a particular line of business did not have the exclusive right to issue stamps within its competitive area, the value of plaintiff's services to its licensees would be greatly reduced. And it is important that licensees be confined to non-competing retailers in a given competitive area because the value of plaintiff's services to its licensees is measured in terms of the advantage the licensees gain in attracting new customers and retaining those he already has. In other words, plaintiff grants exclusive rights to its licensees to issue its stamps in the licensees' competitive area but it does not refuse to deal with any particular merchant or group of merchants. Plaintiff's method of operation springs from business requirements and not for the purpose of monopolizing the trading stamp business or restraining trade.

In Thomas v. Belcher, 184 Okl. 410, 87 P.2d 1084, we held that a retailer's contract with a wholesaler or distributor of merchandise limiting the retailer to a definite and exclusive territory for the resale of such merchandise does not restrain trade or competition in violation of the Federal or State Anti-Trust Laws. See also Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418. If a manufactor and dealer, or a wholesaler and retailer, can agree to an exclusive distributorship in a given area, we can see no illegality in plaintiff granting exclusive rights to a licensee in a particular line of business in a competitive area to issue its stamps.

In the Thomas v. Belcher case, supra, we said:

> "* * * The illegality of contracts in restraint of commerce is a product of public policy. If such contracts are not contrary to public policy they violate

neither the federal nor the state anti-trust laws. Until a commercial arrangement between parties reaches a stage where commodities needful to the public welfare are restricted commercially to the point where the public is exposed to the evils of monopoly, such arrangement is not in restraint of trade within the meaning of the anti-trust laws."

In Times-Picayune Publishing Co. v. United States, 345 U.S. 594, it is stated that a "tying" arrangement violates Sec. 1 of the Sherman Anti-Trust Act when a seller enjoys a monopolistic position in the market for the "tying" product and a substantial volume of commerce in the "tied" product is restrained; and, that the common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market.

In the instant action, licensees do not purchase a commodity but a service, and it is not required to purchase a "tying" product. The collectors have no obligations to the plaintiff as plaintiff's licensees, but the obligations are in favor of the collectors. The trading stamp, when issued represents a closed transaction between plaintiff and its licensee, and creates an outstanding obligation on the part of plaintiff to redeem the stamps. See Sperry & Hutchinson Co. v. Mechanic's Clothing Co., 135 F. 813.

For a general discussion on the legality of the trading stamp business as generally conducted, see The Ohio State Law Journal, Volume 23, No. 1, (1962) pages 35 through 55.

Defendants have cited no case and our independent research fails to disclose any cases supporting the proposition that plaintiff's method of conducting its business in Oklahoma violates any State or Federal laws. In our opinion, and we so hold, that the method by which plaintiff

conducts its business in Oklahoma is not in violation of our State or Federal Laws.

PROPOSITION III

Defendants contend that public interest is adversely affected by the judgment of the trial court and such is therefore improper, inequitable and improvident; and that plaintiff's hands are unclean and is estopped by its illegal conduct, its mode of operations and its failure to treat the stamp collectors fairly, as well as by its discriminatory practices.

Title 79 O.S. 1961, Sec. 1, provides that every act, agreement, contract, or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is declared to be illegal. Article 2, Section 32, of our Constitution provides that perpetuit*ius* and monopolies are contrary to the genius of free government, and shall never be allowed.

However, until a commercial arrangement, or a method of doing business, reaches a stage where the needs of the public are restricted to the point where the public is exposed to the evils sought to be prohibited, or such restriction is contrary to the genius of free government, such arrangement or method of doing business is not against the public policy. See Thomas v. Belcher, 184 Okl. 410, 87 P.2d 1084.

We have heretofore determined that plaintiff's business is not illegal; that it does not violate any State or Federal laws; and that defendants' actions are injurious to plaintiff's business. We have also determined that the stamp business in Oklahoma is competitive and that the competition created by plaintiff and four other major stamp companies doing business in Oklahoma has created defendants' business.

There is no evidence that plaintiff has employed discriminatory practices in selecting or entering into contracts with its licensees; or the method of conducting plaintiff's business prevents others from lawfully engaging in similar enterprises; or that any collector has any more or less rights than any other collector. Each collector has the same redemption privileges as all other collectors and there is no evidence that the stamps, when properly presented for redemption, have any more or less redemption value in one redemption center than in another redemption center.

The trial court found that in one state plaintiff is prohibited by law from carrying on its business; in three other states, plaintiff is required by statute to redeem the stamps in cash; and in thirteen states the statutes require that the stamps be redeemed by plaintiff either in cash or merchandise—at the option of the holder. Our Legislature has not enacted legislation requiring plaintiff to redeem the stamps in cash or redeem the stamps in cash or merchandise—at the option of the holder. In other words, our Legislature has not seen fit to enact any legislation specifically concerning the stamp business or any legislation prescribing the rights, duties and obligations of stamp companies, licensees, and collectors; except, however, penal statutes (Title 21 O.S. 1961, Secs. 361-364), which are not pertinent in the case at bar.

We can only conclude that plaintiff's method of conducting its business does not adversely affect the public interest; that it is legally conducting its business, and the judgment of the trial court is not improper or inequitable.

CONCLUSIONS

In the instant action, we are not concerned with redemption rights but whether plaintiff is entitled to injunctive relief. Whether injunctive relief is to be granted

in an action in equity is a matter within the sound legal discretion of the court, to be determined in the light of all the facts and circumstances and each case must be considered in the light of its own particular facts. Cooke v. Southwest Petroleum Co., 177 Okl. 458, 61 P.2d 16.

The controlling issues herein presented, i.e., the manner or method employed by plaintiff and defendants in conducting their business, were questions of fact and these issues were resolved in favor of the plaintiff and against the defendants by the trial court. In Nowlin v. Wilson, 187 Okl. 173, 101 P.2d 805, we held that the findings of the trial court should be strongly persuasive, and should not be set aside unless this Court can say, in equity and good conscience, that the conclusion reached by the trial court is against the clear weight of the evidence.

We can only conclude and hold that the judgment of the trial court should be and the same is hereby affirmed.

CONCUR: HALLEY, C.J., JACKSON, V.C.J. and DAVISON, WILLIAMS, BLACKBIRD and BERRY, JJ.

APPENDIX E

FILED
IN SUPREME COURT
OF OKLAHOMA
June 22, 1965

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, June 22, 1965

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

40423—Wm. Rance and Ruth V. Rance v The Sperry & Hutchinson Company a corp. Rehearing and oral argument denied.

HARRY L. S. HALLEY
Chief Justice

ATTEST:
Andy Payne, Clerk

APPENDIX F

FILED
IN SUPREME COURT
OF OKLAHOMA
July 27, 1965
Andy Payne, Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, July 27, 1965

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

40423—William Rance and Ruth V. Rance v. The Sperry and Hutchinson Company, a corp. Issuance and transmission of mandate is withheld until September 22, 1965, pending perfection of appeal by plaintiffs in error to the Supreme Court of the United States; if their appeal will stand perfected on or before that date, mandate shall be further withheld until such time as the Supreme Court of the United States shall have rendered a final decision herein or until further order of this Court.

HARRY L. S. HALLEY
Chief Justice

ATTEST: Andy Payne, Clerk

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 582

WILLIAM RANCE and RUTH V. RANCE,
Petitioners,
against
THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 582

WILLIAM RANCE and RUTH V. RANCE,
Petitioners,

against

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

Questions Presented

In addition to the questions presented for review in the Petition for Certiorari, respondent tenders the following question which is also raised by the Petition in this action:

> **Do antitrust violations claimed to exist in the contractual arrangements between a trading stamp company and its licensees and their customers constitute a bar to injunctive relief in a common law action for unfair competition against persons not parties to the allegedly unlawful arrangements?**

Statement of the Case

Respondent, The Sperry and Hutchinson Company ("S&H"), has been engaged in the trading stamp business since the turn of the century (R. 620). The object of the business is to promote retail sales and encourage cash payments (R. 414). For a fee, measured by the number of stamps taken, respondent licenses the retail merchant to issue its stamps at the rate of one stamp for every 10 cents paid by his customer in cash (Pl. Ex. 1A; R. 401, 412). Title to the stamps is retained by S&H (R. 621). The customer pastes the stamps in a collector's book, and when, but not before, the customer has collected one full book (1200 stamps), respondent redeems the stamps in merchandise which the customer selects at one of respondent's redemption centers or chooses from respondent's catalogue (R. 622).

S&H is not the only trading stamp company in the United States. There are some 400 others, some of which operate in Oklahoma, but S&H is the oldest (R. 433, 625). It maintains ten great regional warehouses, over 700 redemption centers, and spends millions of dollars annually on radio, T.V., newspaper and magazine advertising (R. 415, 425, 622-23).

The success of the promotional service which S&H provides and for which its licensees pay depends upon two things: first, S&H must advertise and provide attractive, high quality redemption merchandise at fair prices (in terms of stamps); and second, the housewife must be required to fill at least one book with stamps before she becomes entitled to any of this merchandise. In other words, her interest must be aroused so that she

will return again and again to S&H licensees until she has filled at least one book of stamps.

Petitioners operate a "trading stamp exchange" where they buy, sell, or, for a fee, exchange one brand of trading stamps for another (R. 624). They are trading stamp brokers, dealing in all brands of trading stamps for their own profit (*ibid*).

The S&H promotional service is defeated and its licensed merchants are deprived of the advantage for which they pay if, instead of having to return to them to fill their books, their customers can stop in at petitioners' stamp exchange and buy for cash the stamps they need (R. 423-24, 624).

The success of the S&H promotional system also depends upon the maintenance of the value of the S&H franchise to the licensee. If every merchant on the block or in a given trading area could use the same stamps. no merchant would enjoy any benefit. Accordingly, S&H generally licenses only one supermarket operator, one dry cleaning establishment, one hardware dealer, etc. in a given trading area (R. 413, 621). If the competitors of S&H licensees can drop in at petitioners' stamp exchange and buy the stamps they need to issue to their customers, the competitive advantage for which the S&H licensees have paid S&H is lost.

It is for these reasons, all of them vital to the success of the S&H promotional service, and not for any arbitrary or monopolistic purpose, that S&H retains title to its stamps and seeks to prevent the unauthorized trafficking in its stamps by stamp brokers such as petitioners. The position which petitioners occupy is that of the parasite. They provide none of the value which the trading stamps represent, none of the good will which

the stamps embody. The effect of their operation is to impair the value of the stamps as a promotional device (R. 624).

In unanimously affirming the trial court's judgment enjoining petitioners from trafficking in S&H stamps, the Supreme Court of Oklahoma found that petitioners' activities constituted acts of unfair competition which reduced the value of respondent's services to its licensees, since it weakened the collector's incentive to continue patronizing S&H licensees in order to fill her collector's books (R. 261). The court noted that S&H and its licensees had expended great amounts of money to create a demand for the stamps as a means by which collectors can receive a benefit by patronizing S&H licensees and that S&H had created good will in connection with its stamps which petitioners appropriated against its wishes (*ibid*). In sum, petitioners' activities constituted "a wrongful and unwarranted interference with plaintiff's business" (*ibid*).

Petitioners here challenge none of the foregoing findings and conclusions. They argue that even though they are guilty of unfair competition, interference with respondent's business and appropriation of respondent's good will, the courts below should have denied relief because respondent's method of doing business violates the antitrust laws of the United States.

ARGUMENT

POINT I

Respondent's method of doing business does not violate the antitrust laws.

A. No unlawful tying arrangement exists.

Petitioners appear to claim that there are two illegal tying arrangements involved in respondent's system. First, a tie-in is said to arise because the consumer, in order to buy merchandise from an S&H licensee, must also purchase S&H stamps. Second, it is claimed that once having received the stamps, the consumer is tied to the merchandise available at S&H redemption centers. It is further contended, without support in the record, that the latter tie-in lessens competition in the sales of the merchandise offered for redemption. The facts available in the present record concerning respondent's system of doing business, however, simply cannot be forced into the mold of tying arrangements.

In *Northern Pac. Ry. Co.* v. *United States,* 356 U. S. 1 (1958), this Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." 356 U. S. at 5-6. The Court explained that "the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another" and that the requisite economic power must be sufficient "to impose an appreciable restraint on free competition in the tied product * * *." *Id.*, at 11.

The merchant who issues trading stamps pays for the stamp service for the purpose of attracting customers into his place of business. He does not sell stamps to his customers any more than he sells redeemable cash register tapes, coupons, door prizes, paper bags, air conditioning, and other similar items which are also offered without charge as promotional devices and store services to attract customers. The merchant makes but one sale and that is the sale of the merchandise in his store (R. 263). Stamps are used simply as a promotion to increase the sales of that merchandise; like baseball cards, they are characteristically issued "in combination with some other product, and not alone." *In the Matter of Topps Chewing Gum, Inc.,* 3 CCH Trade Reg. Rep., Par. 17, 251 (F.T.C. 1965). Moreover, it is evident that there can be no sale of S&H stamps by the licensee since the courts below held that, as a matter of state law, S&H at all times retained title to the stamps (R. 259, 625). Hence, there is no second, separate product sold any more than was true in *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594 (1953).

Respondent's claim that licensees make "block" sales of stamps and merchandise because the consumer must pay for the stamps whether she accepts them or not is without merit. No payment is exacted by stamp-issuing stores from their customers relating to the fact that stamps are issued, and nothing in the record supports the contention that retail prices are raised to reflect the cost of the stamp program. In fact, if the stamp service is successful (and there is no reason for the merchant to use the service otherwise), the licensee will increase his volume of business, thus lowering his per unit cost of operation, and his profit on the additional goods he

sells will be greater than the cost of the stamp service. Under these circumstances, there will be no need for him to raise the prices which he charges for his goods.

In addition to the fact that no tie-in or block sale exists because there is but one sale of merchandise by the licensee, it is also apparent that the economic power necessary to effectuate an illegal tying arrangement is lacking from this case. The stamp saver is not forced, coerced or pressured to buy either trading stamps or the merchandise for which the stamps may be redeemed. There exists on the part of S&H or its licensees no economic leverage to compel a consumer to take trading stamps in order to obtain the licensee's merchandise or respondent's redemption merchandise. Under the franchise system followed by S&H, only one merchant engaged in a particular kind of business is generally licensed to handle S&H stamps in a trading area, leaving numerous other competing retailers to whom the consumer may turn if she does not want S&H stamps or if she desires competing trading stamps. Petitioners' frequent reference to the fact that many S&H licensees probably sell patented products misses the point: respondent's licensees are retailers, not patentees, and there are numerous other competing retailers offering the very same patented products, as well as retailers offering competing stamps, to whom the customer may turn if she does not desire respondent's stamps. As this Court said in *Northern Pac. Ry. Co.* v. *United States,* 356 U. S. 1, 6 (1958):

> "• • • Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

Every time a merchant furnishes something other than the basic product that he is selling he may be depriving someone else of the opportunity of selling that "extra something". This is true whether the "extra something" is a paper bag, a reusable container in which the product has come to the merchant or in which he places it, or one of the myriad of promotional gifts and devices which characterize the American system of retail distribution. If the consumer believes that the merchant has raised his prices to cover the cost of the "mix" of promotional elements employed to attract customers, or if he is dissatisfied with the nature or quality of those elements, he is free to take his business elsewhere and neither respondent nor its licensee has the economic power to compel him to do otherwise.

B. No resale price maintenance or price fixing arrangement exists.

Petitioners suggest that respondent, through the provision in its license agreement which requires a licensee to issue one S&H stamp for each ten cents paid, and through its policy of unilaterally determining the number of stamps required to be redeemed in exchange for merchandise, is engaged in resale price maintenance or price fixing. The suggestion fails to withstand analysis.

First, there is no agreement concerning the resale of respondent's trading stamps because those stamps are neither sold nor resold. The stamps are issued (not sold) by licensed merchants to their customers at the rate of one for every ten cents paid in cash for the licensee's merchandise as tokens which may be redeemed for merchandise pursuant to the S&H catalogue. The stamps are never sold separately.

Second, S&H has no control over and does not concern itself with the prices charged by its licensees for the goods they sell, nor does it control or seek to limit the number of promotional devices or the amount of the discounts which the licensee may wish to grant. Under the S&H license agreement, the licensee is free to give other trading stamps, redeemable cash register tapes, premium merchandise or any other trade stimulants he chooses to use. S&H simply tells him that, for reasons completely unrelated to his prices, he must offer one S&H stamp on each ten cent increment of a sale, for if the licensee were not required to offer stamps to his customers on a regular basis, he would receive from respondent a valuable franchise without incurring any obligation on his part to make use of it, and, hence, to help pay for it.

Petitioners' contention that respondent is engaged in resale price maintenance and price fixing through its policy of establishing the redemption rate of stamps for its own merchandise also makes no sense. Petitioner is saying nothing more than that respondent has fixed its own redemption rates. Such unilateral action does not violate the antitrust laws.

POINT II

Respondent's alleged violation of the antitrust laws constitutes no defense to this action.

Even if there were a basis for petitioners' contention that respondent has violated the antitrust laws, such a violation is no defense to the action at bar to enjoin petitioners from engaging in conduct constituting unfair competition.

This action is not a suit by respondent against one of its licensees to enforce the terms of the contract between them; it is an action to enjoin a third party, with whom respondent and its licensees have no contractual relations, from causing irreparable damage to respondent's business, reputation and good will. Petitioner's argument, as we understand it, is that respondent's contracts with its licensees and, through its licensees, with collectors of S&H Green Stamps, constitute tying arrangements and a system of resale price maintenance which violate Section 1 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. §§1, 14 (1958), and that these alleged violations should cause a court of equity to deny relief to respondent against a third person who commits acts of unfair competition by appropriating respondent's good will and valuable services for his own benefit. This and other Courts have repeatedly held that the defense of illegality may not be sustained under such circumstances. *Kelly* v. *Kosuga,* 358 U. S. 516 (1959); *Wilder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165 (1915); *Connelly* v. *Union Sewer Pipe Co.,* 184 U. S. 540 (1902); *Fuller* v. *Berger,* 120 Fed. 274 (7th Cir. 1903), *cert. denied* 193 U. S. 668 (1904); *Revlon, Inc.* v. *Regal Pharmacy, Inc.,* 29 F.R.D. 169 (E.D. Mich. 1961).

In *Revlon, Inc.* v. *Regal Pharmacy, Inc., supra,* the court, in specifically rejecting as a defense to an unfair competition action a claim that the plaintiff's system of distribution violated the antitrust laws, said:

> "In any event, an antitrust violation does not destroy the participant's right to be protected from unfair competition unless the participant is seeking the aid of a court in equity to perpetuate an illegal system." 29 F.R.D. at 177.

Although S&H has attempted to protect its business, reputation and good will by means of its licensing agreements, it is not here attempting to enforce the provisions of those agreements, since petitioners were strangers to them. Respondent's right to relief in this action rests squarely upon its common law right to prevent another person from appropriating without consent the benefits of its efforts for his own profit. *International News Service* v. *Associated Press,* 248 U. S. 215 (1918).

The record clearly shows that respondent, through the expenditure of money for advertising, organization and the establishment of a vast redemption system has created a popular and reputable business upon which petitioners have fastened themselves, using that reputation, popularity and good will as the means by which they seek profit for themselves (R. 261, 624). Since respondent's right to injunctive relief is therefore bottomed upon the right to protect its business from the unfair competition of a party with whom it has had no dealings, respondent's license agreements and arrangements with persons with whom it does business are collateral to its right to relief. Under these circumstances, this Court has stated that a violation of the Sherman Act is no ground for denial of such relief:

> "• • • Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" *Kelly* v. *Kosuga,* 358 U. S. 516, 520-21 (1959).

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari to the Supreme Court of the State of Oklahoma should be denied.

October 18, 1965

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 582

WILLIAM RANCE and RUTH V. RANCE,
Petitioners,

VERSUS

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

REPLY BRIEF

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November, 1965

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No. 582

In the Supreme Court of the United States

OCTOBER TERM, 1965

WILLIAM RANCE and RUTH V. RANCE,
Petitioners,

VERSUS

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

REPLY BRIEF

I

S & H may not obtain the aid of a court in equity to enforce the precise conduct made unlawful by the Sherman and Clayton Acts.

For the first time in this case, the Sperry & Hutchinson Company (S&H) now contends that it is entitled to enforce, by means of injunction, contractual provisions which violate the Sherman and Clayton Acts. (Brief in Opposition, Point II, 9-11). This novel contention represents a grave threat to the effectiveness of the antitrust laws. It is imperative that this Court grant certiorari and dispose of this contention.

The thrust of this new argument is that S & H may base its claim to relief on an unlawful contractual pro-

vision, enforce it by means of injunction against those not parties to the agreement, and then preclude relief for such third parties either by defense or counterclaim. Although this theory is most advantageous to S & H, it is completely without merit or support under the decisions of this Court.

Let it be remembered that in this action, the claim of unfair competition (alleged by S & H) does not involve any use of a trademark, trade name, copyright, misleading advertising or the like. The sole basis for such a claim is that, by contract between S & H and its retailer-licensees, S & H has attempted to retain title to the stamps it issues and thereby seeks to prevent their transfer by members of the public and the Rances. There is no other possible basis for the claim of unfair competition.

The Rances defended this action and, further, sought injunctive relief by counterclaim against S & H on the ground that the attempt to retain title to the stamps and thereby prevent transfer is an essential element in a scheme of illegal tying arrangements and retroactive price-fixing combinations. At no prior point in this action has S & H suggested, much less argued, that it is entitled to enforce violation of the Sherman and Clayton Acts by means of injunction.

In support of this new contention S & H asserts the applicability of six cases. But contrary to such assertions, not one supports the point urged by S & H.

Three cases hold that a violation of the antitrust laws will not preclude recovery of the purchase price of goods sold pursuant to contract which itself is not unlawful.

Kelly v. *Kosuga*, 358 U.S. 516, *Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U.S. 165, *Connelly* v. *Union Sewer Pipe Co.*, 184 U.S. 540. In each of these cases, this Court took care to point out that enforcement of a contract will be denied where to rule otherwise would sanction and give effect to a violation of the antitrust laws inhering in the contract sought to be enforced. The case at bar falls squarely within the exception delineated by this Court. Furthermore, neither the Rances nor customers of S & H licensee-retailers are parties to the licensee contracts.

Fuller v. *Berger*, 120 Fed. 274, relied on by S & H, did not involve any issue of antitrust law.

Two cases relied upon by S & H are actions to enjoin unfair competition. *International News Service* v. *Associated Press*, 248 U.S. 215, holds that there is a common law right to prevent unfair competition. But here, S & H does not base its claim upon any common law right but only on the provision of the licensee contract by which it attempts to retain title. Also, *Revlon, Inc.* v. *Pharmacy, Inc.*, 29 F.R.D. 169, holds that violation of the antitrust laws is no defense to an action for unfair competition based on common law or statutory rights. The holding is wholly inapposite here *since S & H relies solely on the provisions of the licensee agreement.* S & H quotes the following passage from the *Revlon* case, which specifically excepts from its holding the type of case here presented.

> "In any event, an antitrust violation does not destroy the participant's right to be protected from unfair competition *unless the participant is seeking the aid of a court in equity to perpetuate an illegal sys-*

tem." (Emphasis added.) 29 F.R.D. at 177. (Brief in Opposition, 10).

What S & H here seeks is to enforce the precise conduct made unlawful by the Sherman and Clayton Acts.

The case dispositive of this issue is *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, which holds that a participant in a scheme of contracts unlawful under the Sherman Act is not entitled to restrain third persons from inducing breaches of such contracts. Since S & H seeks in this action to restrain the Rances (third parties) based on the unlawful provisions of the licensee contract, this rule is squarely applicable.

In addition, the language of Section 1 of the Sherman Act and Section 3 of the Clayton Act requires rejection of the S & H argument. The language of both sections states that contracts violative of their terms are invalid (15 U.S.C., §§ 1, 14).

Finally, to adopt the argument urged by S & H would mean that illegal schemes could receive the aid of our courts to enforce their unlawful purposes. Defendants, not parties to the schemes, would become victim of the unlawful contracts creating the schemes. Where the damage is caused by an injunction, as is the case here, no recourse would be available. Unable to sue prior to damage, the private individual would be precluded from a defense when sued. The fundamental tenets of fair play require rejection of respondent's argument and necessitate consideration of this case by the Court.

II

The provision of the S & H licensing agreement which attempts to retain title to the stamps issued by S & H is invalid under the Sherman and Clayton Acts.

The Rances' basic proposition is that the attempt by S & H to prevent transfer of trading stamps by the Rances and by customers of S & H licensee-retailers is an essential element in a scheme of illegal tying arrangements and retroactive price fixing. To this proposition, the Brief in Opposition offers only an indirect and dissembling response (Brief in Opposition, Point I, 5-9).

S & H argues that the trading stamps are simply a legitimate promotional device. But S & H ignores the distinction between lawful promotion activities (such as advertising, trade name, competitive values, *etc.*) and the unlawful imposition of market restraints (specifically the attempted retention of title to prevent transfer of the stamps, forced rate of distribution, absence of fixed cash value, and retroactive fixing of redemption rates). These market restraints, not required for legitimate promotional purposes, bring the S & H licensing agreement within the sphere of condemned activity under Section 1 of the Sherman Act and Section 3 of the Clayton Act.

It is not urged that trading stamps are unlawful *per se*, but rather that the attempt to restrain transfer of the stamps by providing for retention of title is an onerous market restraint when viewed in light of the other provisions of the S & H licensing agreement.

S & H argues that there is no unlawful tying arrangement because, it says, ". . . there is no second, separate

product sold . . ." (Brief in Opposition, 6). In using the argument, S & H ignores the fact that the trading stamps represent but one right, the right to redeem for S & H merchandise. Perhaps this oversight was intentional since it would strain credulity to accept a proposition that S & H merchandise is not a second separate product.

S & H also argues that there can be no sale of stamps since the State Court held that S & H at all times retained title to the stamps (Brief in Opposition, 6). By this semantic slight of hand S & H attempts to justify the decision of the State Court by assuming the correctness of the decision. A tautology hardly constitutes supporting argument!

Next S & H argues that it has no market dominance since it does not have control over any patented product (Brief in Opposition, 7). This argument likewise misses the point: S & H has a "not insubstantial" impact on interstate commerce by reason of its contracts with more than 70,000 retailer-licensees, and this market impact is heightened by reason of the advantages derived from the patented products which the licensees sell and the trade names they employ.

Finally, in response to the Rances' proposition that S & H engages in retroactive price fixing, S & H merely claims that compelling the rate of distribution of the stamps and later fixing redemption values is not retroactive price fixing (Brief in Opposition, 8, 9). This bald assertion is no where supported by legal authority nor is it bolstered by any discussion of the applicable legal princi-

ples. Such response seems to be an implicit admission of the validity of the Rances' point.

CONCLUSION

The licensing agreement employed by S & H established a scheme in violation of the antitrust laws. The essential element of the scheme, here in question, is the attempted retention of title for the purpose of preventing transfer of the stamps after they enter the channels of commerce. The unwarranted market restraint achieves an illegal tying agreement and a retroactive price fixing vertical combination.

Therefore, the Rances respectfully request that the writ of certiorari be granted and urge that the decision of the lower court be reversed.

Respectfully submitted,

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